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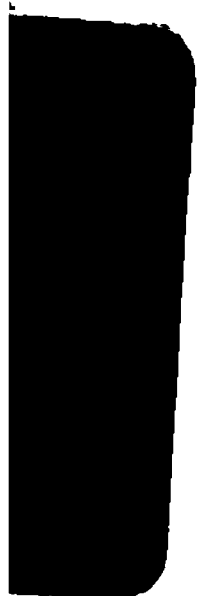
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English Republic -  
mission



# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

*Gr. Brit*  
**Courts of Exchequer & Exchequer Chamber,**

FROM

HILARY TERM, 9 VICT.

TO

TRINITY VACATION, 9 VICT., BOTH INCLUSIVE;

WITH

**TABLES OF THE CASES AND PRINCIPAL MATTERS.**

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BY

**R. MEESON, Esq., AND W. N. WELSBY, Esq.,**

**OF THE MIDDLE TEMPLE, BARRISTERS-AT-LAW.**

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**VOL. XV.**

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**1847.**

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*\* \* A few of the Cases in this Volume are reported by R. P. TYRWHITT, Esq.,  
Barrister-at-Law.*

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## ERRATA.

*Page 374, line 2, for "advanced," read "adduced."*

*399, line 46 of marginal note, for "Nisi Prius record," read "roll."*

*401, line 4, for "Tindal, C. J.," read "Lord Denman, C. J."*

*line 12, for "was of this opinion," read "received the evidence."*

*line 18, for "or," read "and."*

*450, in the marginal note, "Platt, B.," should have been stated to be the dissentient judge, and not "Parke, B."*

*477, line 28, for "imported," read "importer."*

*529, line 17, for "place," read "plan."*

# REPORTS OF CASES

ARGUED AND DETERMINED

IN

## The Courts of Exchequer

AND

## Exchequer Chamber.

HILARY TERM, 9 VICTORIÆ.

1846.

In re BOOTHROYD.

Jan. 13.

JOHN BOOTHROYD was summarily convicted, before two justices of the peace for the West Riding of Yorkshire, under the stat. 17 Geo. 3, c. 56, for having in his possession imposed thereby, by the 58 Geo. 3, c. 51, notwithstanding the erroneous recital in the latter act of the 13th instead of the 17th Geo. 3.

The stat. 17 Geo. 3, c. 56, is repealed, so far as relates to the distribution of the penalties

A conviction under the 17 Geo. 3, c. 56, s. 10, for being in possession of materials suspected to be purloined or embezzled, purported to be made upon the information on oath of the informer and other witnesses, and concluded by directing that the penalty should be paid, applied, and distributed, as the law directs, according to the form and direction of the statute in such case made and provided:—

*Held*, first, that, as the application of the penalty was fixed by the statute, and the justices had no discretion therein, the conviction was sufficient in directing it to be paid, &c. as the law directs.

Secondly, that the conviction need not state the ownership or value of the materials, nor the defendant's knowledge of their having been purloined or embezzled; nor that the informer or witnesses were sworn in the presence of the accused; nor that the accused had not, when before the justices, applied, under the 12th section of the act, for time to produce the parties from whom he had the goods.

Thirdly, that it was sufficient if the conviction followed in substance the form given by the statute; and that it was no objection to it, that it stated the information to have been on the oath of the informer and other witnesses, (for the purpose of excluding the informer from any share in the penalty); or that the conviction purported to have taken place in a *township*; or that the information on which the *search-warrant* was granted stated only that the informer *had cause to suspect*, &c.

*Quære*, whether the validity of a conviction, where the right to remove it by certiorari is taken away by statute, can be questioned on motion for a habeas corpus, the *commitment* not being before the Court.

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materials used in the woollen and worsted manufacture, suspected to have been purloined or embezzled. The conviction was in the following terms:—

“ West Riding of Yorkshire, to wit.—Be it remembered, that, on the 17th day of September, in the year of our Lord 1845, at Holmfirth, in the township of Wooldale, in the parish of Kirburton, in the West Riding of the county of York, (the township of Wooldale then, and thence hitherto, and still being a township having separate overseers of the poor of the said township, and the inhabitants of the said township then, and thence hitherto, and still maintaining the poor of the said township separately and apart from the said parish at large), John Boothroyd, of Honley, in the said riding, clothier, was convicted before us, John Harpin, Esq., and Joseph Charlesworth, Esq., two of her Majesty’s justices of the peace in and for the said riding, upon the information upon oath of John Earnshaw, of Newtown, in the township of Upper Thong, in the said riding, inspector, a credible person, the informer in this behalf, (which said information was made by the said John Earnshaw as aforesaid, heretofore, to wit, on the 15th day of September, in the year of our Lord 1845, and in the riding aforesaid, to the said John Harpin and Joseph Charlesworth, then and still being two of her Majesty’s justices of the peace in and for the said riding), and upon evidence upon the oaths of certain persons, of whom the said informer was one, to wit, of the said John Earnshaw, and [here the conviction set out the names and description of the other witnesses], credible witnesses, (which said evidence was so given as aforesaid on the day and year first above mentioned, at Holmfirth aforesaid, before us the said John Harpin and Joseph Charlesworth, so being such justices as aforesaid, in the presence and hearing of the said John Boothroyd), of a misdemeanour; for that he the said John Boothroyd had, on the 15th day of September, in the year of our Lord 1845,

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in his possession, in his dwelling-house, situate in the township of Honley, in the parish of Almondbury, in the said riding, (the said township of Honley then, and thence hitherto, and still being a township having separate overseers of the poor of the said township of Honley, and the inhabitants of the said township of Honley then, and thence hitherto, and still maintaining the poor of the said township of Honley separately and apart from the said parish of Almondbury at large), certain materials used in the woollen and worsted manufacture, to wit, 130lbs. weight of woollen caps and woollen waste, then and there suspected to be purloined or embezzled, and then and there found in the dwelling-house of the said John Boothroyd, and in the possession of the said John Boothroyd. And the said materials having been so found as aforesaid, the said John Boothroyd, having been duly brought before us the said John Harpin and Joseph Charlesworth, so being such justices as aforesaid, on the said 17th day of September, in the year of our Lord 1845, at the said township of Wooldale, in the parish of Kirburton aforesaid, in the riding aforesaid, he the said John Boothroyd did not then, or at any other time, give an account, to the satisfaction of us the said justices, how he came by the said materials, nor did he the said John Boothroyd then, or at any other time, produce before us the said justices the party or parties, or any person or persons duly entitled to dispose of the same materials, or of whom he bought or received the same; but though then and there required by us the said justices, then and there wholly neglected and refused so to do, contrary to the form of the statute in such case made and provided; whereby and by force of the said statute the said John Boothroyd is to be deemed and adjudged guilty of a misdemeanour. Whereupon we the said justices, so being such justices as aforesaid, do adjudge the said John Boothroyd to be guilty of the said misdemeanour, and that he hath forfeited for his said offence the sum of £20 of lawful money of Great

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Britain, to be paid, applied, and distributed as the law directs, according to the form and directions of the statute in such case made and provided: and if the same be not paid, and if no sufficient distress shall be found whereon to levy the said penalty and forfeiture of £20, then we the said justices do adjudge that the said John Boothroyd be committed to the House of Correction at Wakefield, in and for the said riding, without bail or mainprize, for the space of one month, according to the form of the statute in such case made and provided. Given under our hands and seals, the day and year first above written.

“ John Harpin, (L. s.)

“ Joseph Charlesworth, (L. s.)”

This conviction was founded on the following information:—“ The information and complaint of John Earnshaw, of Newtown, in the township of Upper Thong, in the said riding, taken upon oath before us, two of her Majesty’s justices of the peace acting in and for the said riding, on the 15th day of September, in the year of our Lord 1845, who saith, that he hath cause to suspect, and verily believes, that a quantity of purloined and embezzled materials used in the worsted, woollen cloth, mohair, or silk manufacture, are concealed in the dwelling-house, out-house, yard, garden, or other place or places in the possession or occupation of John Boothroyd, of Honley, in the said riding, manufacturer. He therefore prays our warrant to search the said premises for the said materials; and if on such search the same shall be found, that they may be disposed of, and the guilty party dealt with, according to law.

“ John Earnshaw.

“ Sworn before us, { John Harpin,  
                                   { Joseph Charlesworth.”

Boothroyd appealed, under the 20th section of the above statute, to the Quarter Sessions, when the conviction was

confirmed, and, in default of payment of the penalty, he was committed for a month to the House of Correction at Wakefield.

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*Pashley* now moved, on an affidavit setting forth the above facts, for a writ of habeas corpus to the keeper of the House of Correction, commanding him to bring up the body of the said John Boothroyd, in order that he might be discharged.—The commitment in this case is not before the Court; but the conviction on which it is founded is shewn to the Court, and it is defective in several material particulars. The right to remove the conviction by certiorari is taken away by the 22nd section of the 17 Geo. 3, c. 56; but it is nevertheless competent to the party convicted to apply for a habeas corpus, and on that motion to shew the defects of the conviction: *In re Reynolds* (a).

First, then, this conviction is bad, for not containing a sufficient adjudication of the mode in which the penalty shall be applied. It merely directs, that it shall be “paid, applied, and distributed as the law directs, according to the form of the statute in such case made and provided.” The question depends upon the effect which the subsequent statute, the 58 Geo. 3, c. 51, had upon the 17 Geo. 3, c. 56, as to the application of the penalties given by the latter statute. The 17 Geo. 3, c. 56, s. 14, directs, that one moiety of the penalty shall be paid to the informer, and the other moiety “to and amongst the poor of the parish, town, and place where such conviction shall be, or to such public charity or charities as the justices convicting shall appoint.” Then, by the 58 Geo. 3, c. 51, various acts are recited and repealed or amended, and amongst them, “An act passed in the *thirteenth* year of his present Majesty, intituled” &c., [setting out a title identical with that of the 17 Geo. 3, c. 56], so far as relates to the payment of forfeitures; and

(a) 1 Dowl. & L. 846.

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enacts, that the penalties shall be applied, one moiety to the informer, and the other to the churchwardens and overseers of the poor of the parish in which the offence was committed. There was, however, an act of the 13th of Geo. 3, relating to this subject-matter, viz. the 13 Geo. 3, c. 68, empowering magistrates to settle and regulate the wages of persons employed in the silk manufacture within their respective jurisdictions, to which the repeal may be applied. And the mere *title* of an act is immaterial: *Chance v. Adams* (a), *Bryant v. Withers* (b). It is true, that "17 Geo. 3" is printed in the margin opposite to the words "thirteenth year of his present Majesty," but the notes in the margin are no part of the statute. [*Alderson, B.*—Surely the title shews, with greater certainty than the date, the statute to which reference is made.] It appears to have been taken for granted, in *Davis v. Nest* (c), that a conviction under the 17 Geo. 3, c. 56, giving a portion of the penalty to a charity, was still valid. This question was expressly raised in the case of *Reg. v. Wilcock*, in the Court of Queen's Bench, not yet reported (d). In *Reg. v. Barrett* (e), a conviction for deer stealing, whereby the penalty was adjudged to be paid "according to the form of the statute," without directing in terms that one half should go to the poor, and the other half to the party aggrieved, was held good; but that was before the passing of the Gilbert Act and of the Poor-law Amendment Act. [*Alderson, B.*—Can that possibly make any difference? Can the fact of the law being more or less complicated affect the question?] But, further, this conviction purports to have taken place in a *township* maintaining its own poor, whereas the statute directs that the penalty shall go to the poor of the *parish*.

(a) 1 Ld Raym. 77.

(b) 2 M. & Selw. 123.

(c) 6 C. & P. 167.

(d) Since reported, 14 Law J.,  
 N. S., Q. B., 217, and expressly

deciding that the 17 Geo. 3, c. 56,  
 is repealed by the 58 Geo. 3, c. 51,  
 as to the application of the penalty.

(e) 1 Salk. 383.



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If the township be extra-parochial, the informer would be entitled to the whole penalty: *Rex v. Wyatt* (a), *Rex v. Priest* (b). [Alderson, B.—It seems to me that it is sufficient to say that it is to be paid “as the law directs;” and that for this purpose “township” and “parish” are on the same footing. The 17 Geo. 3, c. 56, s. 18, enacts, that any inhabitant of any parish, township, or place where the offence was committed, shall be a competent witness, that is, notwithstanding his being interested as entitled to the penalty.]

Secondly, the conviction does not follow the form given by the schedule of the 17 Geo. 3, c. 56, and therefore it ought to be complete in all respects, and to state, with the same certainty as in an indictment, everything necessary to constitute the offence charged. Now this conviction does not state to whom the goods belonged, or that the owner was unknown; nor the value of the goods, or that they were of any value; nor that the party had them in his possession with the knowledge that they were purloined or embezzled. It has been held necessary to allege the value of, and property in, the goods, as well in an indictment for false pretences as for larceny; *Rex v. Norton* (c), *Reg. v. Martin* (d); and also that the defendant knew of the falsehood of the pretence: *Rex v. Henderson* (e). Neither does the conviction state that the informer or the witnesses were sworn in the presence of the defendant, which is essential to give him an opportunity of cross-examination, or examination on the voir dire, so as to shew that their testimony was inadmissible. Again, the conviction states that the justices proceeded on the *information* of the informer and other witnesses, whereas the statute gives them power to proceed only upon *complaint*. Lastly, for aught that is stated, the defendant may have requested the justices, under the 12th section of the act, to put off the hearing, in order

(a) 2 Ld. Raym. 1478.

(b) 6 T. R. 538.

(c) 8 C. & P. 196.

(d) 8 Ad. & E. 481.

(e) 2 Mood. C. C. 192.

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to give him a reasonable time to produce the persons entitled to dispose of the materials. The conviction ought to have negatived such request. [*Pollock*, C. B.—That is by way of proviso, and should come by way of defence.]

There is also an objection to this conviction, not of form but of substance. The 17 Geo. 3, c. 56, s. 10, requires that the justices shall proceed “upon complaint made to them *on oath*, that there is cause to suspect that any such materials are concealed in any dwelling-house,” &c. But here no such complaint was made, but only that the informer stated that he had cause to suspect that purloined and embezzled materials were concealed in the dwelling-house of Boothroyd.

Lastly, the information or complaint does not shew the offence to have been committed within the jurisdiction of the justices, which is necessary, according to *In re Clark (a)*.

POLLOCK, C. B.—As this case relates to the liberty of the subject, it was right that it should be heard to the fullest extent, in order that redress may be afforded, in case it should turn out that the liberty of the subject has been improperly interfered with. The application, however, so far as my experience goes, is a novel one. I am not aware of any instance of a conviction of this nature being brought up, where the commitment under which the party is imprisoned has not been brought before the Court, and where the jurisdiction and conduct of the committing justices have been sought to be impeached merely by an affidavit made on behalf of the party complaining. The objections made to the proceedings in this case, and in respect of which it is contended that a writ of habeas corpus ought to issue, are founded on a conviction, the commitment under which is not before us. It is suggested, that, if the commitment were before us, it would probably be found to be objectionable, on

(a) 2 Q. B. 619.

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grounds which have not been stated; but it is urged, that, assuming the commitment founded on this conviction to be good in itself, the party is entitled to his discharge, if the conviction is bad. If that be so, then every Court and every Judge who has power to issue a habeas corpus, is a Court of appeal from every conviction by justices of the peace all over the kingdom. That would undoubtedly be the effect of granting this application, and I see no escape from that consequence; so that, if any of the objections made in this case had been well founded, and we had granted the writ, we could not have prevented the same course being taken in any case, even though the right to remove by certiorari may have been expressly taken away by the statute. I have therefore some doubt whether we ought to have heard this case to the extent we have done. I am, however, of opinion that this conviction is perfectly good. One objection which has been urged is with respect to the application of the penalty: it is contended that the penalty is not necessarily to go to the poor of the parish, inasmuch as the 17 Geo. 3, c. 56, is not in this particular altered by the 58 Geo. 3, c. 51. Now the 58 Geo. 3, c. 51, recites certain statutes, with the view merely to shew the particular subjects and enactments to which its provisions are intended to apply: it then introduces certain new provisions, whereby all previous provisions inconsistent therewith must be considered as repealed. Now, among the acts recited in the 58 Geo. 3, c. 51, there is one which is mentioned as having passed in the *thirteenth* year of the reign of King George the Third, the title of which is set out, and which is identical with the title of the 17 Geo. 3, c. 56. It is said, however, that we cannot consider the 58 Geo. 3, c. 51, as operating at all on the 17 Geo. 3, c. 56, as that is not among the recited acts. But the *title* of the statute intended to be affected is distinctly stated, and, there being no other statute but the 17 Geo. 3, c. 56, so intitled, and no statute of the 13 Geo. 3 which could be affected by the 58 Geo. 3, c. 51,

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I think it must be read as referring to the 17 Geo. 3, c. 56, and the statement of time treated as a mistake, and as surplusage. And if we hold, as I think we are bound to do, that the 58 Geo. 3, c. 51, does operate on the 17 Geo. 3, c. 56, then it is evident that the very object of the later statute was to avoid the difficulties which had arisen as to the exercise of a discretionary power in justices respecting penalties imposed by the earlier statutes; and, apparently with a view to obviate the very objection now made, it is provided that half of the penalty shall go to the informer, and half to the poor of the parish, &c.; and if the informer be a witness, then the whole is to go to the poor. This objection, therefore, is, as it appears to me, altogether without foundation. With respect to the further objection founded on the supposition that the 17 Geo. 3, c. 56, is not, as to the application of the penalties, affected by the 58 Geo. 3, c. 51, viz. that the conviction improperly directs the penalty to be paid "as the law directs," I think the true rule is, that, where the justices are to exercise a discretion, they must shew on the face of the conviction that they have done so; but if no discretion is vested in them, then it is sufficient for the conviction to state that the penalty is to go as the law directs. It is said that difficulties may arise from the circumstance that this particular place was not a *parish* maintaining its own poor, but a *township* within a parish. The justices, however, have nothing to do with that, nor are they called upon to decide more points of law than come properly before them. The case in which it was held, that, in extra-parochial places, the informer was entitled to the whole of the penalty, whether correctly decided or not, does not apply here, because, under another part of this statute, the penalty is either to go to the poor of the township or of the parish at large; and in either case the offender is to pay the amount.

Another objection is, that the conviction does not follow the form prescribed by the act. No doubt it is an esta-

lished rule, that, if a conviction is drawn up in the ordinary mode, as at common law, and not according to the form given by the statute, it must be complete in every respect. If the statutable form is adopted, it is sufficient to comply with it as it stands. It is said that this conviction purports to be made on the information of the informer, who was examined on oath. It is, however, sufficient if the form given in the statute be followed substantially: it need not be followed verbally. Now, if the informer is examined as a witness, he is not entitled to any part of the penalty, but the whole of it goes to the poor; so that it is necessary to state in the conviction that there was an informer, and that he was examined. That is done here: the conviction does not state too much, but only enough to give effect to the adjudication according to law.

Another objection is, that this conviction is founded on an information laid before the magistrates, which was a bad one. That, however, is not so. The affidavit, it is true, distinctly states that the conviction took place on the information set out therein; but that is a mistake, for it is plain that the information set out in the affidavit is not that on which the conviction proceeded, but that under which the search was made, and under which the defendant, and the articles found in his house, were brought before the justices; and the defendant's not giving any satisfactory account of his possession thereof, was the offence of which he was convicted.

A further objection is, that the conviction does not state to whom the goods belonged, or their value. It does state all that is necessary to identify them; and there is nothing in the act from which it can be inferred that it is necessary to state the ownership or value. The offence is the same, whoever may be the owner of the goods. I also think that any statement of the value is unnecessary: it is enough if the conviction shews that they were of the *kind* spoken of in the

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statute. This conviction is therefore perfectly good, and no rule ought to be granted.

PARKE, B.—I am of the same opinion as my Lord Chief Baron on all the points. If this conviction had turned out to be bad, I should have wished for time to consider whether, on that ground, this party would be entitled to a habeas corpus. The conviction is, however, perfectly good; and therefore any opinion on that point is unnecessary. I do not mean to say that we should, in such a case as this, interfere in that way; I give no opinion at all on the point.

The first objection made to this conviction is, that it awards a penalty, and leaves it to be applied and distributed as the law directs; and it is contended that this is insufficient, inasmuch as the 17 Geo. 3, c. 56, gives to the convicting justices a discretion as to the application of the penalty. Now that depends on the effect of the 58 Geo. 3, c. 51; and I think it is perfectly clear that that statute repeals the 17 Geo. 3, c. 56. The words “the thirteenth” of the King were no doubt introduced by mistake into the preamble of the 58 Geo. 3, c. 51, instead of “the seventeenth” of the King; and that objection is therefore of no value. No difficulty arises in consequence of the fact that this might be a township maintaining its own poor, because the 18th clause of the 17 Geo. 3, c. 56, shews that the word “parish” must be read “parish or township maintaining its own poor,” and, therefore, includes a quasi parish, or township, maintaining its own poor.

The next objection is to the want of sufficient certainty in this conviction; and it is said that a conviction should be as certain as an indictment; but the reasoning applicable to the case of an indictment does not apply here. It is argued, that the property in the materials ought to be shewn; and a case tried before my Brother *Alderson* was cited, where it was held, that, in an indictment

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for obtaining goods by false pretences, the value of the goods must be stated. But upon such an indictment the party may be convicted, although the facts proved amount to larceny; and therefore it is necessary there to state the value. In this case the value is immaterial. It matters not to whom the goods belong, because the offence consists in the suspected party failing to give the justices a satisfactory account of how he became possessed of them. That objection, therefore, cannot prevail. It is next objected, that the conviction does not follow the statutable form, and that, at common law, and independently of the statutable provision, it is not a good conviction: and it is said to be bad, because it does not allege the witnesses to have been examined upon oath, administered in the presence of the accused party. But the statute does not require that the precise form of the conviction it gives should be followed; such alterations as are necessary in the particular case may be made. In the present case, the informer was examined as a witness, and as that was a circumstance which affected the application of the penalty, it became necessary to state it, in order to shew the ground of the alteration. Enough is stated to support this conviction.

The last objection is, that the whole proceeding was *coram non judice*, on the ground of an alleged defect in the jurisdiction of the magistrates. That, however, has not been brought before us, for the affidavit speaks only of the evidence on which the search-warrant was obtained. I am therefore of opinion, that this conviction is good.

ALDERSON, B.—I have considerable doubt whether we could question the validity of a conviction on such an application as this. Much would depend on the form in which the commitment should come up, which would be the more correct mode of trying the legality of the custody. Suppose that the commitment stated generally, that the party was convicted for having in his possession embezzled



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materials, without setting out the conviction itself; I doubt whether, as the certiorari is taken away, we could question that conviction on affidavits. I do not wish it to be drawn into a precedent, that the validity of a conviction may be discussed before us on an application like this: I give no opinion upon that point. Justices will now hear the opinion of this Court, that the mention made in the 58 Geo. 3, c. 56, of the 13 Geo. 3, is a mere error, and that the repealing clause in the former must be construed by the express words of the title of the act. I entirely concur with my Lord and my Brother *Parke* in what they have said as to the other objections. Under this statute, a party can only be convicted upon the suspected materials being brought before the justices, which are to be disposed of by them, or restored to the accused party if he can prove his title to them, so that no question can afterwards arise about them; and it is therefore unnecessary to identify them, or state their quantity or value. I am inclined to think it would be enough to state that the party was brought before the justices with materials found in his possession of the *species* mentioned in the statute.

PLATT, B.—It seems to me to be idle to consider the propriety of keeping a man in custody, until we see the commitment under which he is detained; at any rate, it would certainly be most convenient, in all cases of this kind, to produce before the Court, either the commitment, or an attested copy of it. Here, however, it is to be assumed that the commitment is good in all respects; and the first question is, whether the 17 Geo. 3, c. 56, is, as respects the application of the penalties, repealed by the 58 Geo. 3, c. 51. Now there is amply sufficient in that statute to convince any one that the intention of the legislature was to repeal the 17 Geo. 3, and not the 13 Geo. 3. It is clear that the word “thirteenth” was inserted by mistake merely. With respect to the other points, if any one of

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them could be maintained here, to what purpose would the legislature have taken away the certiorari? The effect would be to raise, in the form of an application for a habeas corpus, every possible objection which might formerly have been raised on certiorari. As to the value of the goods, I think that need not be stated, because, be the value what it may, the penalty is the same. It would be otherwise in a case in which treble the value of the goods was sought to be recovered, as frequently occurs in revenue cases in this Court. Then as to the point made about the ownership of the goods. The very section on which this conviction is founded, (the 10th section), after reciting, "that whereas it frequently happens that materials used in the manufactures before mentioned are found or known to be concealed in the possession of persons who have received the same knowing them to be purloined or embezzled, &c., and that the discovery and conviction of the purloiners or embezzlers, buyers or receivers, of such materials is full of difficulty, from the close and clandestine manner in which the offence is committed, and there is still greater difficulty in proving whose property such materials are," expressly gives the justices power to convict, "although no proof shall be given to whom such materials shall belong;" so that it would be mere idle surplusage to state the ownership. It is said that it does not appear that the witnesses were sworn in the presence of the person charged; but we assume that everything was correctly done. It is objected, also, that the information does not state the place where the offence was committed; but we must take the commitment to be perfect, and the subject-matter of the conviction within the jurisdiction of the justices, and then the conviction is good in omnibus.

Motion refused.

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*Pashley* then mentioned that there were several reported cases, in which the Court had allowed the legality of an im-

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prisonment to be discussed on an application for a writ of habeas corpus, although the certiorari had been taken away by statute; and referred to *Rex v. Chaney* (a), *In re Fletcher* (b), and *Reg. v. Martin* (c):—of which cases the Court took a note.

(a) 6 Dowl. P. C. 281.

(b) 1 Dowl. & L. 726.

(c) 2 Q. B. 1037.

GOODYEAR v. SIMPSON and Others (a).

A number of coach-proprietors, who horsed a coach, were in the habit of having monthly accounts made out, containing the names of proprietors, the amount of the receipts and disbursements, the number of miles worked by each, and the proportion of the earnings to which each was entitled. These accounts were made out by the clerk of one of the proprietors, partly from materials furnished by them, and partly

DEBT for work and materials, goods sold and delivered, money paid, and on an account stated. Plea, never indebted.

At the trial, before *Pollock*, C. B., at the London sittings after Trinity Term, 1845, the following facts appeared in evidence:—The action was brought to recover from the defendants, who were innkeepers and coach-proprietors, the sum of 110*l.* 14*s.* 9*d.*, for the supply of horses by the plaintiff for the defendants' coach for one stage, from February to October 1840, at the rate of thirty guineas a month. It appeared that the practice was for an account to be made out by the defendants at the close of each month, called the "monthly account," which contained the names of the parties concerned in working the coach, the amount of the receipts and disbursements, the number of miles worked by each, and the proportion of the earnings to which each was entitled. This account was made out by a Mr. Carpenter, from the way-bills; and the practice was, for the clerk to send to each proprietor a copy of the monthly account, shewing the amount which each had to receive or pay, and the proprietor or proprietors from or to whom he was to receive or pay such amount:—*Held*, that this account was not an award, and was admissible in evidence without a stamp.

(a) Decided in Michaelmas Term, 1845, (Nov. 4).

the clerk to one of the defendants, partly from the way-bills, and partly from materials furnished to him by the defendants. After it was so made up, a copy was sent by the clerk to each proprietor, accompanied by a short abstract, stating the account of each with the company in respect of his share of the receipts, disbursements, and earnings, and shewing the balance which each was entitled to receive or had to pay, accordingly as his disbursements and share of mileage exceeded or fell short of the sums received by him: and by the terms of the account, each proprietor was to receive or pay the difference from or to one or more of the other proprietors, so as to adjust the shares of all. Upon the plaintiff's counsel tendering one of these monthly accounts in evidence, to shew that the sum of 31*l.* 10*s.*, alleged to be due to the plaintiff, had been charged against each of the defendants, it was objected for the defendant that the document amounted to an award, and was not admissible without a stamp. The Lord Chief Baron received the evidence, and the plaintiff obtained a verdict, damages 110*l.* 14*s.* 9*d.*; leave being reserved to the defendant to move to enter a nonsuit.

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*Crowder* now moved accordingly.—This document amounted to an award, and, being unstamped, was not receivable in evidence. *Carr v. Smith* (a) is in point. There, the proprietors of a stage-coach made an arrangement that each of them should horse the coach for certain stages, and should receive the payments and make the necessary disbursements; and it was their practice that one or more of the partners, every month, made up and sent round to all the others a written account, derived from the way-bills, shewing the receipts and disbursements of each proprietor; the net share of the profits, if any, due to each; and the proprietors by and to whom the ascertained shares were to be

(a) 5 Q. B. 128.

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paid: and the payments were made accordingly. There the Court appears to have considered that such a document amounted to an award, and required a stamp as such. [*Pollock*, C. B.—The clerk who made out this account was the common servant of all the parties.] He was the private clerk of one of them, employed by all to adjust and finally settle the account between them, in the same sense as an arbitrator is employed by the parties to the reference. [*Pollock*, C. B.—I thought this was no more an award than would be the settlement of the accounts of a firm, at the end of the year, by a clerk, who assigned the due share of the profits to each of the partners. *Parke*, B.—Before it can be contended that these accounts required a stamp as an award, it must be shewn by evidence aliunde that the parties agreed to be bound by them.] There was sufficient evidence of such an agreement. In *Jebb v. M'Kiernan* (a), the condition of a bond was for A. M.'s due discharge of the duties of clerk to the plaintiffs, to be ascertained by the inspection of his accounts by J. S., and the amount so ascertained was to be liquidated damages. It was held, that a paper in J. S.'s handwriting, in which he had ascertained the amount of the deficiency in A. M.'s accounts, required a stamp as an award.

POLLOCK, C. B.—I think there should be no rule on this point. I think this document is not to be considered as an award: it is a mere adjustment of accounts, liable to be corrected, having no binding authority, but acquiesced in from time to time, because the accounts are found to be correct. My Brother *Alderson* has discovered, indeed, that an error in one of the accounts has been corrected in a subsequent account. *Jebb v. M'Kiernan* is not in point. There the matter in dispute was referred to the decision of a third party, which was intended to be binding, and therefore

(a) Moo. & M. 340.

amounted to an award. Here the person making out the accounts was the common servant of all the parties in doing so, and his settlement was merely an adjustment of the accounts, and nothing like an award.

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PARKE, B.—The account does not on the face of it purport to be an award, and therefore it must be shewn to be so by extrinsic evidence; but there was no evidence of this being an instrument which was intended to bind the parties as an award. In *Carr v. Smith*, the judgment of the Court is in the alternative; all that is said is, in effect, that there was no satisfactory evidence of the document's amounting to an award, but that if there were, it would require a stamp.

ALDERSON, B.—There is nothing to shew this document to be an award; it was only intended as a convenient statement, to shew the general state of the accounts, and what parties were to receive payment, and from whom. If it were an award, it would be a most preposterous one; for if a balance is due to the plaintiff, it is to be received from six people, so that it might be necessary to bring six actions.

ROLFE, B., concurred.

Rule refused.

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mortgage," within the words of the Stamp Act, 55 Geo. 3, c. 184, Sched., part 1, tit. Mortgage; because here the deeds were deposited three years before.] Secondly, the document is not a lettter of procuration, or power of attorney. *Regina v. Kelk* is quite distinguishable: that was the case of a letter of procuration to vote as a proxy. [They were then stopped by the Court.]

*Montague Smith* (with whom was *Cockburn*), in support of the rule.—This instrument amounts to an agreement pledging or charging land, within the meaning of the Stamp Act, 55 Geo. 3, c. 184, Sched., part 1, tit. Mortgage; the words of which are, "also any agreement, contract, or bond, accompanied with a deposit of title-deeds, for making a mortgage &c. of any lands, estates, or property comprised in such title-deeds, or for pledging or charging the same as a security." It explains and is founded upon the deposit of the title-deeds, and may be considered as accompanying it; and it contains an agreement for thereafter pledging the profits of the lands as a security for the repayment of the money borrowed. Again, it is evidence of what the parties have agreed shall be the security for the loan, and is enforceable in equity; it therefore ought to have had an agreement stamp: *Hill v. Ransom* (a).

POLLOCK, C. B.—I think this rule must be discharged. This document is a mere ratification or recognition of the distress, and of the authority of the defendant Partridge to distrain, reciting his authority, and giving a reason for it, viz. the previous loan of money by him. It may be that, from the terms of that recital, a court of equity would give effect to the instrument by way of equitable mortgage; but, in terms, it is no more than a ratification of an authority to distrain, and the stamp does not apply to such an instrument.

(a) 6 Scott, N. R., 571.

PARKE, B.—I also think that this document does not fall within the Stamp Act. The clause referred to only applies to cases where the agreement is accompanied with a deposit of title-deeds. That was not the case here, for the deeds had been deposited long before the execution of this instrument; and no fraud has been suggested.

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PLATT, B., concurred.

Rule discharged.

SIBREE v. TRIPP.

Jan. 15, 18.

**ASSUMPSIT.**—The first count was upon a promissory note for £50; the second and third counts were for money The plaintiff deposited with the defendant the sum of

£500 for the purpose of a speculation in foreign stock, and the defendant signed the following memorandum:—"Bristol, August 14, 1843. Memorandum.—Mr. S. has this day deposited with me £500, on the sale of £10,300, 3*l*. per Cent. Spanish, to be returned on demand:"

*Held*, that this was not a promissory note, and did not require a stamp as such.

To an action for £1000 money had and received, and £1000 due on an account stated, the defendant pleaded, as to £500, parcel of the sum in those two counts mentioned, that the account was stated of and concerning the said sum of £500, parcel &c., in the first count mentioned, and no other; that, after the said causes of action arose, the plaintiff commenced, in the Tolzey Court of Bristol, an action of debt for the recovery of the said sums of £500 and £500; that the defendant disputed the said supposed debt, and denied that he owed or was liable to pay it, or that the plaintiff could recover it; and thereupon, to terminate the said dispute and difference, and the claim and demand of the plaintiff in the said action, and finally to determine the same, the plaintiff and defendant agreed that the said action should be settled by the defendant making and delivering to the plaintiff three promissory notes, for payment to the plaintiff, or order, of the sums of £125, £125, and £50, and that the plaintiff should accept and receive the same in satisfaction and discharge of the said sums of £500 and £500, and all damages and costs, and that the plaintiff should discontinue the said action. Averment, that the defendant made and delivered to the plaintiff the said three promissory notes, and that the plaintiff accepted the same in full satisfaction and discharge of the said sums of £500 and £500, and the damages and costs, &c. The replication denied the making of the agreement stated in the plea.

The defendant proved, in support of this plea, that the plaintiff had sued him in the Tolzey Court for the £500, when it was agreed between them that the defendant should give, in settlement of the action, three promissory notes, two for £125 each, and one for £50, payable to the plaintiff or his order, which he did; and the following memorandum was then indorsed by the plaintiff's attorney on the writ served in that action:—"This action is settled by the defendant giving three promissory notes, viz. one at three months £125; one at four months, £125; and one at twelve months, £50; upon payment of which, I undertake to deliver to F. S., Esq., [the defendant's attorney], the several papers in my possession in reference to this action.—J. P. H." The defendant paid the two notes for £125 each when due, but refused payment of the note for £50:—

*Held*, first, that the above plea was a good answer to the action in point of law; for that the acceptance of a negotiable security may be in law a satisfaction of a debt of a greater amount.

Secondly, that the plea was proved by the giving of the promissory notes in pursuance of the agreement, and that it was not necessary to shew that they were all paid at maturity.



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had and received, and on an account stated, the sum laid in each of them being £1000.

The defendant pleaded (with non assumpsit and other pleas), fifthly, as to the sum of £500, parcel of the sum in the second and last counts mentioned, that the account stated in the last count was stated of and concerning the said sum of £500, parcel &c., in the said second count mentioned, and no other; that, after the said causes of action as aforesaid arose, the plaintiff commenced, in the Tolzey Court of Bristol, an action of debt against the defendant, for the recovery of the said sums of £500 and £500; that the defendant disputed the said supposed debt, and denied that he owed or was liable to pay the same, or that the plaintiff could recover it; and thereupon, to terminate the said dispute and difference, and the claim and demand of the plaintiff in the said debt and action, and finally to determine the said action, the plaintiff and defendant agreed that the said action should be settled by the defendant making and delivering to the plaintiff three promissory notes in writing, by which the defendant should promise to pay to the plaintiff, or order, the sums of £125, £125, and £50 respectively, and that the plaintiff should accept and receive the same in full satisfaction and discharge of the said sums of £500 and £500, and all damages and costs, and that the plaintiff should discontinue the said action. Averment, that the defendant made and delivered to the plaintiff the said three promissory notes, and that the plaintiff accepted the same in full satisfaction and discharge of the said sums of £500 and £500, and the damages and costs, &c. Verification.

Replication, that no such agreement was ever made modo et formâ &c.; on which issue was joined.

At the trial, before *Pollock*, C. B., at the London sittings after last Trinity Term, it appeared that this action was brought to recover the sum of £50 due upon a promissory note, and also the sum of £500, which had, in August 1843, been deposited by the plaintiff with the defendant for

the purpose of a speculation in Spanish stock. At the time of the deposit, the following memorandum was given by the defendant to the plaintiff:—

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“Bristol, August 14th, 1843.

“Memorandum.—Mr. Sibree has this day deposited with me £500, on the sale of £10,300, 3l. per cent. Spanish, to be returned on demand.

“James T. Tripp.”

On this document being tendered in evidence, stamped with an agreement stamp, it was objected for the defendant that it amounted to a promissory note, and required a stamp accordingly. The Lord Chief Baron overruled the objection, and received the paper in evidence.

The defendant then proved, in support of his plea, that an action had been brought against him by the plaintiff in the Tolzey Court at Bristol, for the recovery of the sum of £500; when it was agreed between them that the defendant should give, in settlement of the action, three promissory notes, two for £125 each, and the third for £50, payable to the plaintiff or his order, which he accordingly did; and the following agreement was thereupon indorsed by Mr. Hinton, the plaintiff's attorney, upon the process served on the defendant:—

“This action is settled by the defendant giving three promissory notes, viz. one at three months, £125; one at four months, £125; and one at twelve months, £50: upon payment of which several promissory notes, I undertake to deliver to Foskett Savery, Esq., [the defendant's attorney] the several papers and letters in my possession in reference to this action.

“January 6th, 1844.

“J. P. Hinton.”

The two promissory notes for £125 each were paid when due; but the third, for £50, was refused payment by the defendant, on the ground of its not having been indorsed. The present action was thereupon brought.

Upon these facts, it was contended, on behalf of the plain-

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tiff, that the fifth plea was not proved; for that, in order to support that plea, it was necessary to prove, not only that the notes were given in satisfaction of the debt, but also that they had been paid. The Lord Chief Baron was of opinion that the plea was proved, and accordingly directed a verdict for the defendant on that issue, giving the plaintiff leave to move to enter a verdict for him for £200. In Michaelmas Term last,

*Butt* obtained a rule to shew cause why the verdict should not be entered for the plaintiff accordingly, or why there should not be judgment for the plaintiff notwithstanding the verdict on the above issue.

*Jervis* and *Hoggins* now shewed cause.—This plea is a good answer to the action, and was fully proved at the trial. The proof was, that the former action was settled by giving the three promissory notes; and it was not necessary, in order to prove the plea, and to establish a good defence to this action, to shew that they were paid at maturity. The plaintiff, by that agreement, got certain negotiable securities for his debt; if they were not duly paid, he had the right to sue upon them. Suppose any of the notes to have been negotiated by the plaintiff, and not paid by the defendant to the holder at maturity: would the plaintiff be entitled to maintain the present action, and the holder of the note at the same time have a right to sue the defendant upon it as maker? If the plaintiff meant to make the settlement of his claim dependent upon the *payment* of the promissory notes, he ought to have worded the agreement accordingly, and said “by the defendant giving *and paying*,” &c.; whereas he states that the action is settled by the *giving* of the notes. It is true that it is only on *payment* of the notes that the papers in the cause are to be delivered up; but that may well have been in order to preserve evidence of the consideration for the notes, in case it became necessary to enforce them.

But, secondly, the document given in evidence by the

plaintiff amounted to a promissory note, and required a stamp accordingly.—On this point they cited *Brooks v. Elkins* (a), *Waithman v. Elsee* (b), *Shenton v. James* (c), and *Ellis v. Mason* (d).

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*Butt* and *Taprell*, in support of the rule.—First, as to the stamp. It is not every agreement for the repayment of a sum of money that amounts to a promissory note. This is merely a memorandum of acknowledgment of the *deposit* of money, with an agreement to restore the sum deposited: it is not the case of a *loan* of money. *Melanotte v. Teasdale* (e) is an authority against this objection. [*Parke*, B.—I am disposed to think that this paper imports a return *in specie* of the thing deposited, in which case it certainly is not a promissory note; but then there would be a question whether an action for money had and received would lie. However, it will be better first to consider the other point in the case.]

Secondly, the agreement proved by the defendant does not support the plea. The reasonable meaning of that agreement is, that it is not to operate in *satisfaction* of the debt, unless the notes are duly paid: *Maillard v. Duke of Argyll* (f); and, the notes having been paid in part only, the plaintiff has a right to sue for the residue of the money. The notes were not taken in absolute satisfaction, but only conditionally upon their being all paid when due. This is shewn by the provision for retaining the original securities and vouchers until payment of the notes. In *Sard v. Rhodes* (g), the defendant pleaded, in answer to a declaration by the indorsee of a bill of exchange for £43 against him as the acceptor, that the drawer made his promissory note for £44, and delivered it to the plaintiff *in full satis-*

(a) 2 M. &amp; W. 74.

(b) 1 Carr. &amp; K. 35.

(c) Id. 137.

(d) 7 Dowl. P. C. 598.

(e) 13 M. &amp; W. 216.

(f) 6 Man. &amp; G. 40; 6 Scott, N. R., 938.

(g) 1 M. &amp; W. 153.

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*faction and discharge* of the bill sued on. The plaintiff replied, that the note for £44 was not paid when due, and still remained unpaid. It was held that the plea was good, and the replication bad; but that was on the ground that the note was alleged in the plea, and admitted by the replication, to have been given in *satisfaction and discharge* of the bill; and *Parke, B.*, says,—“If it had been averred that the promissory note was given *for and on account of* the bill, it might have been different.” A bill given merely to *take up* a former bill or note, or *in lieu thereof*, and not paid when due, unless the jury find it to have been given in satisfaction, does not affect the remedy on the original bill or note: *Goldslade v. Cotterell* (a); see *Ex parte Bartlett* (b), *Lumley v. Musgrave* (c). And the settlement of the action does not at all import the extinguishment of the original cause of action, but only the suspension of the remedy: *Watters v. Smith* (d), *Field v. Robins* (e).

Lastly, this plea is substantially bad, and the plaintiff is therefore entitled to judgment non obstante veredicto. The plea confesses a debt, and seeks to avoid it by an alleged accord and satisfaction; but in truth it is a mere plea of a promise to pay a smaller sum of money in satisfaction of a larger, which, according to all the authorities, is no answer to the declaration. If it had been a gift of a *chattel* in satisfaction, that would have been different. It is true the plea states the debt to have been *disputed* on the former occasion, but that cannot destroy the effect of the present admission of it. To make the plea a good answer, it ought to have averred that there was an *alleged* debt, or a mere disputed claim; as it stands, the averment of the debt being disputed is idle and immaterial.—On this part of the case, they cited Com. Dig., “Action on the Case,” (F. 8); *Cumber*

(a) 2 M. &amp; W. 20.

(b) 7 Ves. 597.

(c) 4 Bing. N. C. 9.

(d) 2 B. &amp; Adol. 889.

(e) 8 Ad. &amp; E. 90.

v. *Wane* (a), *Heathcote v. Crookshanks* (b), *Fitch v. Sutton* (c), *Greenwood v. Ledbitter* (d), *Thomas v. Heathorn* (e), *Down v. Hatcher* (f), and *Newhall v. Holt* (g).

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POLLOCK, C. B.—The motion of Mr. *Butt* in this case was to enter a verdict for the plaintiff on the issue joined on the fifth plea, or for judgment, notwithstanding the verdict found for the defendant on that issue. With respect to the first part of the motion, it involves these two points: first, whether the plaintiff's case was made out by the memorandum proved in evidence; and, secondly, if it was, whether the answer given by the defendant was available to put an end to the plaintiff's right of action. If the paper proved by the plaintiff amounted to a promissory note, the issue ought to remain as found for the defendant. On consideration of the authorities cited, it appears to me that the memorandum did not amount to a promissory note. It is difficult to lay down a rule which shall be applicable to all cases; but it seems to me that a *promissory note*, whether referred to in the statute of Anne or in the text-books, means something which the parties *intend* to be a promissory note. We cannot suppose that the legislature intended to prevent parties from making written contracts relating to the payment of money, other than bills and notes; and this appears to me to be merely an instrument recording the agreement of the parties in respect of a certain deposit of money, the consideration of which is stated in the memorandum itself, and to be rather an agreement than a promissory note.

The second question is, whether the agreement proved by the defendant put an end to this action. [His Lordship read the agreement, and the fifth plea.] The only question

(a) 1 Stra. 426.

(b) 2 T. R. 24.

(c) 5 East, 230.

(d) 12 Price, 123.

(e) 2 B. &amp; C. 477.

(f) 10 Ad. &amp; E. 121.

(g) 6 M. &amp; W. 662.

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now is, whether, as matter of evidence, this plea was sustained in proof; and that turns on the true construction of this indorsement upon the writ in the Tolzey Court of Bristol. We are to put the best construction upon it that we can, and to see whether the intention of the parties was, that the action should cease, and the debt should be extinguished; or whether the plaintiff reserved to himself the right, in case the promissory notes were not paid when due, of suing on the original consideration. It appears to me that the proper construction is, that the parties intended that the action should be settled, and that plaintiff should have a lien on the papers, in order to give the defendant a greater reason for promptness of payment; but that the notes were given in satisfaction of the debt, and that the *giving* of the notes alone constituted that satisfaction. The words of the agreement seem to import, that, on the giving of the notes, the plaintiff was to look to them as constituting his remedy, and the defendant to them as constituting his liability. If it were otherwise, then, on the slightest laches as to one of the notes, though all the others were paid when due, and that one the day after, the whole arrangement would be void. On this point, therefore, as matter of evidence, I am of opinion that the plea was proved.

The other part of the rule is to enter judgment for the plaintiff non obstante veredicto, on the ground that the giving of these notes could not in point of law be a satisfaction of a liquidated claim for a larger amount. If the case of *Cumber v. Wane* were law, and a binding authority upon us, undoubtedly we could not come to a conclusion in favour of the defendant. That case was one of assumpsit for £15, to which the defendant pleaded that he gave the plaintiff a promissory note for £5 in satisfaction, and that the plaintiff received it in satisfaction: and it was held, on writ of error, after judgment for the plaintiff, that the plea was ill. It does not appear from the report, whether the note was payable presently, or whether it was negotiable or not. The

facts are not sufficiently stated to make it a binding authority. *Pratt*, C. J., says, in delivering the judgment of the Court, "As the plaintiff had a good cause of action, it can only be extinguished by a satisfaction he agreed to accept; and it is not his agreement alone that is sufficient, but it must appear to the Court to be a reasonable satisfaction; or at least the contrary must not appear, as it does in this case. If £5 be, as is admitted, no satisfaction for £15, why is a simple contract to pay £5 a satisfaction for another simple contract of three times the value? In the case of a bond, another has never been allowed to be pleaded in satisfaction, without a bettering of the plaintiff's case, as by shortening the time of payment." From the latter part of the judgment I must, with every respect for the great authority of that learned Judge, express my dissent. Undoubtedly at that time it was not law; for in *Pinnel's case* (a) it was laid down as clear matter of law, that, in the case of a bond for £500, due on the first of January, if the obligee accepted £100 in satisfaction the day before, he was at liberty to do so; and the Court never inquired whether the satisfaction was *reasonable*; they left it to the agreement of the parties. However, it does not appear, in the case of *Cumber v. Wane*, that the promissory note was negotiable, and therefore that the plaintiff had any benefit from it. The marginal note of that case—"Giving a note for £5 cannot be pleaded as a satisfaction for £15"—was expressly denied to be law by Lord *Ellenborough*, in argument in *Heathcote v. Crookshanks*, and *Buller*, J., referred to a case of *Hardcastle v. Howard*, in which it had been so denied to be law. But whether the case of *Cumber v. Wane* have been overruled or not, it appears to me that it cannot be sustained as an authority that the acceptance of a negotiable security may not be a satisfaction of a claim to a larger amount. *Sard v. Rhodes* is a distinct authority that the acceptance of a negotiable security may be pleaded in satisfaction of a simple

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(a) 5 Rep. 117.



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contract debt for a *like* amount: and the only question is whether the same doctrine is applicable where the original claim was for a larger amount. I think it is. It is admitted, that if there had been an acceptance of a *chattel* in satisfaction of the debt, the Court would not examine whether that satisfaction was a reasonable one, but merely whether the parties came to that agreement; and the acceptance of a negotiable security appears to me to be of the same nature. Again, if a claim is *bonâ fide disputable*, *Longridge v. Dorville* (a) is an authority to shew that the party may be barred by the acceptance of a much less sum in satisfaction of it. Here the demand is apparently for a liquidated amount; but under the count for money had and received, that amount may be very disputable: and the plea avers, that in the former action the defendant disputed the said supposed debt, and denied that he owed or was liable to pay it, and thereupon, to terminate the dispute and difference &c., the plaintiff and defendant agreed that the action should be settled by the giving of the promissory notes. If so, that was an admission by the plaintiff that the claim was so far disputable as to justify him in coming to such an agreement. Upon the whole, I am of opinion that this plea is a good answer to the action, and that it was proved at the trial, and therefore that this rule ought to be discharged.

PARKE, B.—I am also of opinion that this rule ought to be discharged. The first question is, whether this plea was proved. [His Lordship read it.] The issue upon that is, that no such agreement was made as is mentioned in the plea; that is, no agreement to give and accept these promissory notes in satisfaction of the debt. The Lord Chief Baron decided at the trial that the plea was proved, reserving for the opinion of the Court the question on the construction of the agreement. When Mr. *Butt* moved for

(a) 5 B. & Ald. 117.

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this rule, I certainly was strongly impressed with the idea that this agreement amounted only to a suspension of the remedy, and not to a satisfaction of the debt; but after hearing the present argument, and on full consideration of the case, I have come to the same conclusion as my Lord Chief Baron, that the parties meant it to be a final extinguishment of the debt. The agreement is in these terms: [His Lordship read it.] As to the first part of it I have no doubt: it is a settlement not only of the action, but of the claim. The settlement of an action *prima facie* means the settlement of the cause of action. And unless the notes were to be substituted as the remedy, the agreement would be of this extraordinary nature, that, if any one of them were not paid at maturity, the whole debt would become due. The reasonable construction therefore is, that it was to be an absolute settlement of the debt, and that the only future liability should be upon these notes. Then comes the second part of the agreement, on which my doubt arose; namely, that, upon payment of the several promissory notes, the plaintiff undertook to deliver up the papers and letters in his possession in reference to the action. But I think that may well be explained in the manner in which Mr. *Jervis* explained it, that it would be desirable to keep some evidence of the original consideration, in case the notes were not paid. Upon the whole instrument, therefore, it appears to me that the real meaning of the parties was, to put an end to the action, and for the larger sum claimed in it to substitute a smaller, secured by three promissory notes.

The next question is, whether, if proved in fact, this is a good plea in law; and I am of opinion that it is. I will consider it in the way proposed by Mr. *Butt*, striking out the averments as to its being a disputed debt. It is clear, if the claim be a liquidated and ascertained sum, payment of part cannot be *satisfaction* of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder. But the gift of a thing of uncertain value may be a satisfaction

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of any sum due on a simple contract. If the contract be by bond or covenant, it can be determined only by something of an equal or higher nature; but upon a mere simple contract, it is clear that the debtor may give anything of inferior value in satisfaction of the sum due, provided it be not part of the sum itself. Littleton thus lays it down (s. 344):—"Also, in case of feoffment in mortgage, if the feoffor payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such thing, in full satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if he had received the sum of money, though the horse or other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in full satisfaction." The same doctrine is laid down in *Pinner's case*. It is clear, if the creditor had the money itself, he might buy with it a thing of however inferior value, and that contract would be good: so, he may accept the same thing in satisfaction of the whole sum, and that contract is good. In the case of a bond or contract under seal, it is different. "The obligor or feoffor cannot, at the time appointed, pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater: but if the obligee or feoffee do at the day receive part, and thereof make an acquittance under his seal in full satisfaction of the whole, it is sufficient, by reason the deed amounteth to an acquittance of the whole" (a). Eodem ligamine quo ligatum est dissolvitur. Again, a sum of money payable at a *different time* is a good satisfaction of a larger sum payable at a future day: Com. Dig., Accord, (B 2). In the present case (supposing it a liquidated demand), the satisfaction is by giving a *different thing*, not part of the sum itself, having different properties. It *may be* of equal value, but that we cannot enter into: it is sufficient that the parties have so agreed. The case of *Andrew*

(a) Co. Litt. 212. b.

*v. Boughey* (a) is an authority in support of this view. There the declaration was for delivering 373 lbs. of bad wax, upon an assumpsit for 400 lbs. of good and merchantable wax, stating half the price to have been paid in hand, the rest to be paid upon a day agreed on. To this the defendant pleaded, that, before the time appointed for the delivery of the residue of the wax, "the plaintiff and defendant did agree, that if the defendant would deliver immediately to the plaintiff one cake of wax weighing 20 lbs., the defendant would accept that in recompense, as well for the aforesaid 373 lbs. as for the residue which was to be delivered; and pleaded this executed in certain, with the acceptance by the plaintiff accordingly:" and this plea was held a good answer. The Court say, that "the bar seemed good enough, for the effect and substance of the action is, that the defendant hath not performed his bargain, scil., with good and merchantable wax, according to his undertaking; but that it was corrupted and mixed as above, and deceitful; for which the plaintiff has received satisfaction and recompense by the cake, and his own acceptance, although it were not of one hundredth part of the value of his loss, yet by his own accord and agreement this injury is dispensed with; and in all actions in which nothing but amends is to be recovered in damages, there a concord carried into execution is a good plea." It seems to me that this reasoning applies to the present plea, because here a different thing, of uncertain value, is delivered in satisfaction of the debt.

The cases of *Cumber v. Wane* and *Thomas v. Heathorn* have been referred to. The reasoning of *Pratt*, C. J., in the former case is certainly not correct; for we cannot inquire into the *reasonableness* of the satisfaction. But there it did not appear that the note was a negotiable one; and the point now before the Court was not made. In *Thomas v. Heathorn*, it does not appear to have been a case of accord

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(a) Dyer, 75 a.

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and satisfaction: although the bill accepted by the defendant was a negotiable security, it does not appear that it was given by way of accord and satisfaction.

As to the other question, whether the statement in this plea, that it was a disputed debt, makes the plea a good answer, I think that is very doubtful, because it does not state that it was disputable on fair and reasonable grounds. This question was considered in the case of *Wilkinson v. Byers* (a), in which it was held, that, where an action has been commenced for an *unliquidated* demand, payment by the defendant of an agreed sum in discharge of such demand, was a good consideration for a promise by the plaintiff to stay proceedings and pay his own costs. *Littledale, J.*, there went further than the rest of the Court, and expressed his opinion, that, even in the case of a *liquidated* demand, the same promise, made in consideration of the payment of such sum, might be enforced in an action of assumpsit, where the agreement was such that the Court would stay proceedings if the plaintiff attempted to go on. He referred to a case of *Reynolds v. Pynhowe* (b), where a declaration in assumpsit, —“that whereas the defendant had recovered £5 against the plaintiff, in consideration of £4 given him by the plaintiff, the defendant assumed to acknowledge satisfaction of that judgment before such a day, and that he had not done it,”— was held good, on the ground that it was a benefit to the defendant to have the money without suit or charge. On the authority of that case, *Littledale, J.*, held, that if there was a dispute as to a *liquidated* debt, the payment and acceptance of a smaller sum might be a good satisfaction. The rest of the Court, however, did not go upon that ground, and therefore I do not rest my judgment upon this point. But, for the reasons I have already stated, I think this plea is good, and that there ought not to be judgment for the plaintiff non obstante veredicto.

(a) 1 Ad. & E. 106; 3 Nev. & M. 853. (b) Cro. Eliz. 429.

With respect to the question as to the stamp, it is unnecessary to express any opinion upon it; but I think this document did not require a stamp except as an agreement. This is not a contract to pay money, but a *deposit* of money, and the identical money is to be returned.

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ALDERSON, B.—As to the question relating to the stamp, we must look at it as it arises on the face of the instrument itself, and I think it bears the construction put upon it by my brother *Parke*. Then as to the main points in the case, I agree in thinking that here the original debt was discharged merely by the *giving* of the promissory notes, and that the plaintiff was remitted to his only remaining remedy, namely, upon those notes, and had lost his original right of suing upon the original memorandum. If we did not put this construction upon the agreement, we should certainly do great injustice, because, by the non-payment of any one of the notes on the very day it became payable, the whole money would become due. That is so strong a circumstance as makes one hesitate to come to such a conclusion; and the literal meaning of the agreement does not require us to do so; for the latter words of it may very well be consistent with the construction we put upon it; the papers being retained, in order, if any doubt arose as to the sufficiency of the consideration when the notes were put in suit, to shew its nature, in order to enforce them with greater certainty. I think, therefore, that the plea is proved. Then the next question is, is the plea a good one? I consider this as a liquidated demand. Then is there a good answer to it? The suggested answer is, that the defendant gave certain promissory notes of a smaller amount, and the plaintiff accepted them in satisfaction and discharge of that demand. It is undoubtedly true, that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand ought to be paid, is *payment* only in part; because it is not one bargain, but two; namely, payment of part, and an agreement,

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without consideration, to give up the residue. The Courts might very well have held the contrary, and have left the matter to the agreement of the parties; but undoubtedly the law is so settled. But if you substitute for a sum of money a piece of paper, or a stick of sealing-wax, it is different, and the bargain may be carried out in its full integrity. A man may give in satisfaction of a debt of £100, a horse of the value of five pounds, but not five pounds. Again, if the time or place of payment be different, the one sum may be a satisfaction of the other. Let us, then, apply these principles to the present case. If for money you give a negotiable security, you pay it in a different way. The security may be worth more or less: it is of uncertain value. That is a case falling within the rule of law I have referred to. But here there is the further circumstance, that the payment was in discharge of a debt then under litigation, by means of a negotiable security, which takes away that litigation. On these grounds, I am of opinion that this plea is good.

PLATT, B.—I am of the same opinion. With respect to the objection, that this document was inadmissible for want of a stamp, I think we must look to the instrument only in determining that question; and it seems to me quite clear, on the face of the instrument itself, that it is an agreement to return a deposit of money in a particular event. It is, therefore, not a promissory note. With respect to the other points, I agree with the rest of the Court, for the reasons which they have stated, that the fifth plea is a good answer to the action in point of law, and that it was proved in point of fact.

Rule discharged.

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FRITH v. ROTHERHAM.

Jan. 16.

**DEBT** on bond, in the penalty of £2000.—The condition of the bond (after reciting that the Chesterfield and North Derbyshire Banking Company had, on the application of the defendant, agreed to open an account with him, on his securing the several sums of money which might from time to time become due on the balance of his account to the said Company, &c.) was declared to be, that, if the defendant did or should well and truly pay, or cause to be paid, unto the trustees of the said Company, or the survivor of them, &c., to the use of the said Company, either alone or conjointly with any other person who might or should at any future time constitute the firm of the said Company, all and every such sum and sums of money, not exceeding in the whole the sum of £1000, which from time to time should be and remain due and owing from the defendant to the said Company, either alone, or conjointly &c., on the balance of his account current with the said Company or such other persons &c., with respect to monies advanced by them to him the defendant, together with such interest and commission as should be due to the said Banking Company for the time being, or such other persons &c., and all customary and incidental charges for stamps, &c., the bond should be void, &c. The defendant pleaded non est factum.

A bond conditioned for the payment to bankers of all such sums of money, not exceeding in the whole £1000, which from time to time should be and remain due from the obligor to the bankers on the balance of his account current, *together with such interest and commission as should be due to the said bankers, and all customary and incidental charges for stamps, &c., requires a stamp only on the principal sum of £1000.*

The bond bore a stamp of £6, being the ad-valorem duty on £1000. At the trial, before *Rolfe*, B., at the last Liverpool assizes, it was contended for the defendant that the stamp was insufficient, and that, by reason of the stipulation for payment of interest and commission, and charges for stamps, it ought to have been impressed with a stamp of £25. The learned Judge reserved the point, and the plaintiff had a verdict, damages 1101*l.* 1*s.* 1*d.*; leave being reserved to the defendant to move to enter a nonsuit.



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*Martin* now moved accordingly.—The point in this case depends upon the construction of the Stamp Act, 55 Geo. 3, c. 184, Sched. pt. 1, tit. “Bond,” clause 2, which is as follows:—“Bond, &c., given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be:—Where the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit, £25: and where the money secured, or to be ultimately recoverable thereupon, shall be limited to a certain sum, the same duty as on a bond for such limited sum.” Here the whole amount secured, and recoverable by the obligees, is composed of the principal sum of £1000, and of the sums which may become due for interest or commission, and for charges on stamps, which latter are uncertain and without any limit. It was decided in *Scott v. Allsopp* (a), and is now a settled doctrine, that the proper amount of stamp duty, in the case of a bond, depends, not upon the amount of the penalty, but upon the nature of the condition, and the amount secured by and recoverable upon the bond. And here the amount secured by and recoverable upon the bond is altogether unlimited. *Dickson v. Cass* (b) is expressly in point. There, a bond was given in a penalty of £2000, the condition of which, after reciting that A. & B. had opened an account with D., E., F., & G., as bankers, and that the latter had agreed to discount bills, and pay in advance for A. & B. any sum not exceeding £1000, was, that A. & B., and C. should satisfy and pay the bankers all such sums as they should advance on account of the accepting or paying any bills &c., together with such lawful charges and allowances for advancing and paying such bills as were usually charged by bankers in such cases, and interest: and it was held, that this, being a

(a) 2 Price, 20.

(b) 1 B. & Adol. 343.

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bond to secure not only £1000, but a further sum for the bankers' charges for commission, &c., required a £25 stamp. [*Parke, B.*—That case is undoubtedly an authority for you, unless it is to be considered as overruled. I concurred in the judgment given in that case, but with some hesitation; and after the decision in *Doe d. Mercer v. Bragg (a)*, I began to think our judgment was erroneous.] It has never been expressly overruled. All the cases which have subsequently occurred were cited in *Barker v. Smark (b)*, but they relate to mortgage deeds, which often contain mere collateral stipulations for other things than the payment of money. Bankers' commission is purely money. [*Parke, B.*—In order to require the larger stamp, it must be *secured as money* by the condition.] A banker's commission is an understood and definite charge, and the payment of it clearly was part of the consideration for the taking of the bond. [*Parke, B.*—How is this commission “money thereafter advanced, lent, or paid, or due upon an account current?” It is a remuneration for labour. Nothing is due *on the account current* beyond the £1000. The Stamp Act does not apply to anything which is merely a remuneration for labour, but only to money advanced, lent, or paid, or due on an account current. Here all the money that is to be advanced, lent, or paid, or to become due on the account current, is limited by the £1000. It has already been decided that the *interest* is not to be taken into consideration in estimating the stamp duty.] That was upon the other words of the act, “definite and certain sum of money.”

POLLOCK, C. B.—I entertain no doubt whatever upon the point which is raised in this case. It is a clear principle, that the subject is not to be charged with any such duties, unless the legislature has manifested its intention to impose them by clear and express words. And the meaning of

(a) 8 Ad. & E. 620; 3 N. & P. 644.

(b) 7 M. & W. 500.

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that part of the Stamp Act to which Mr. *Martin* was referred appears to me to be plain. I think its clear meaning is, that an ad-valorem duty is to be charged upon the *money secured*, as limited not to exceed a certain sum; and referring back to the heading of the clause, the bond is to be one "given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be." Those are the words by which the bond to be taxed is described in the schedule; and according as its amount is limited or unlimited, the stamp duty is to be estimated. In the present case, special care has been taken to give a limit of £1000, as the sum which is to be secured by the bond. It is true, indeed, that further on in the condition, after the clause imposing that limit of £1000, (which we all know would include interest and commission), there is a further provision, that the security of the bond is for that sum of £1000, together with interest and commission. Whether that clause was inserted merely to exclude the notion that commission and interest should not be charged, and to give the bank by express terms the right to recover them as well as all the other items of their account current, I do not know. I think it is extremely probable that these words, if they come to be examined, mean nothing more than that, on making up the account current, interest and commission were to be included in the account. But I am perfectly prepared to go along with the opinion thrown out by my Brother *Parke*, that the case of *Dickson v. Cass* was not well decided, and has been substantially overruled, as to this point, by subsequent cases, although not expressly mentioned. There were three points decided in *Dickson v. Cass*, and I am now only speaking of that for which it has been cited, namely, the first point. I think it quite right to say, that, having thus to deal with an apparently recognised decision in point, of the whole Court of Queen's Bench, if there were any real doubt whatever on

my mind upon the point, I should be disposed to grant a rule; in order to have it further discussed; but as, on the best consideration which I can give to the subject, it appears to me that if we were to do so, we should, when the case came on for argument, call on Mr. *Martin* to support his rule; and as he has already urged everything that could be urged in favour of the proposition for which he is contending, it would be a mere useless consumption of the time of the Court to grant a rule. In my opinion, therefore, the view of my Brother *Parke*, which he has expressed to day, and which differs from that adopted by him, as he says with reluctance, in *Dickson v. Cass*, is the correct one; and that case must consequently be considered as overruled. If so, this bond is sufficiently stamped, and there is no occasion for any further time to be consumed in the discussion of the point.

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PARKER, B.—I am entirely of the same opinion with my Lord Chief Baron, and think there ought to be no rule. If there had been no decided cases on the construction of this statute, I should have considered it clear that the present bond was one which only required the ad-valorem stamp, and not the higher duty imposed by the other clause of the schedule which has been referred to. For, look what the duty is imposed on;—"every bond given as a security for the payment of any definite and certain sum of money," &c.:—the tax is regulated by the amount of the *money secured* by the bond, and not by the amount of the penalty, whether it be a "definite and certain sum," or "money to be thereafter lent, advanced, or paid, or which may become due on an account current," &c. We come, therefore, to the first question: is the bond in this case a bond for the payment of a definite and certain sum of money? or is it a bond within the meaning of the subsequent clause, "given as a security for the repayment of any sum and sums of money lent, advanced, or paid, or which may become due on an account

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current, together with any sum already advanced or due, or without, as the case may be, where the total amount of the money secured or to be ultimately recoverable thereupon shall be uncertain and without any limit," on which the schedule imposes a duty of £25; whereas, where the money secured or to be ultimately recoverable thereupon shall be limited not to exceed a given sum, the same duty only is charged as for a bond for such limited sum. In the condition of the bond in this case, there is a limit to the sum lent, advanced, paid, or due on an account current, which the bond was given to secure, and consequently, if the condition contained that clause alone, the duty should be for that limited amount; and here the bond bears a stamp exceeding that amount. The question then is, does this bond become liable to the higher duty, in consequence of any other circumstances connected with it? It is argued that it does, because it not only secures money to be lent, advanced, or paid, or which may remain due on the balance of the account current, but stipulates for something else to be paid, namely interest and commission, which is not money advanced, lent, or paid, or which necessarily becomes due on an account current. Now, supposing the bond to have been given for the principal and interest only, it has been held by this Court, in the case of *Barker v. Smark*, that interest is not money lent, advanced, or paid, within the meaning of this part of the Stamp Act; and consequently that, where a bond is given to secure a sum of money with interest, the stamp is regulated solely by the amount of the principal sum; and the only question remaining is, does the addition of the right to charge *commission* make any difference? But how can it be said that commission comes under any of the heads in respect of which the schedule imposes the fixed duty? It is not "money lent," it is not "money advanced," it is not "money paid," it is not "money due on an account current:" it is a remuneration for work and labour: and there is no clause in the statute which imposes an additional stamp on a bond

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given to secure such remuneration. If, therefore, the point in this case were *res integra*, I should certainly say that this bond was not liable to any stamp duty beyond £6: and the question before us is reduced to this, has the authority of decided cases put a different construction on the statute? It must be admitted that the case of *Dickson v. Cass*, in which I myself concurred with considerable reluctance, is an authority against the view which we are now disposed to adopt; but I very early repented of my concurrence in that judgment, and am now satisfied that it was erroneous. Let us look to the course of the decisions since that of *Dickson v. Cass*. The first is *Doe d. Scruton v. Snaith (a)*, which was decided on the analogous clause in the Stamp Act, relating to mortgages; and it was there held, that a mortgage deed for £3000, with a power of sale to secure the principal and all expenses, with interest, was sufficiently stamped with a £9 stamp, and did not require the £25 stamp imposed by that schedule on every mortgage given as security for the repayment of a sum uncertain and unlimited in amount. It is true that the Court distinguished *Dickson v. Cass* from the case before them; but it is clear that they did not approve of that decision. That case was followed by *Doe d. Jarman v. Larder (b)*. There a term of years, determinable on lives, was mortgaged to secure a sum of £130, with power to the mortgagee to pay £70 for a renewal, in case a life should drop; and it was held that the deed was sufficiently stamped with a £2 stamp, notwithstanding there was a covenant by the mortgagor to procure a renewal, without any limit to the sum to be paid by him for that purpose. The Court, in giving judgment, said, that a stamp on a mortgage within the meaning of the act was a stamp on a security in the name of a mortgagor, and not merely on any covenant; and that a £25 stamp was, therefore, not necessary in that case,

(a) 8 Bing. 146; 1 M. & Scott,  
230.

(b) 3 Bing. N. C. 92; 3 Scott,  
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because no more than £70 was to be advanced by the mortgagor after the first advance, and for anything which the mortgagor might fail to pay, the mortgagee's only remedy was on the covenant; on the premises mortgaged he had, in respect of such failure, no security at all. That case is not precisely in point, but it shews an endeavour made by the Court to get out of the doctrine of *Dickson v. Cass*. Since then there has been the case of *Paddon v. Bartlett* (a), where premises were mortgaged to trustees with power to sell, to secure the sum of £1137, with interest: the deed then contained a clause, empowering the trustees, out of the proceeds of the sale, to pay and discharge the costs and expenses to be incurred in the execution and due performance of the trusts reposed in them, and also a reasonable sum of money by way of satisfaction for their trouble. Now there was a case, where, in addition to the principal, a further sum was secured by way of remuneration to the trustees; but the Court, on that objection being taken, very shortly disposed of it, by saying that it lay on those who made the objection to shew that a reasonable satisfaction to the trustees would raise the whole amount above £2000; and although they distinguished the case from *Dickson v. Cass*, I can only say that they seemed very desirous to get out of it. We now come to *Doe d. Mercer v. Bragg* (b), which is the latest case on the subject, and where Lord Denman, with the rest of the Court of Queen's Bench, virtually overruled the authority of *Dickson v. Cass*. After all the previous cases had been cited, and the Court had taken time to consider, Lord Denman said, "The objection here was, that the mortgage deed was stamped only to the extent of the sum advanced, and did not cover the amount of taxes and rates which might be charged on the premises, and which the mortgagor covenanted to pay, and until payment of

(a) 2 Ad. & E. 9; 4 N. & M.  
 1.

(b) 8 Ad. & E. 620; 3 N. &  
 P. 644

which the proviso for redemption was not to operate. This amount is truly said to be uncertain and without limit; and hence the £25 stamp is argued to be necessary, instead of the ad-valorem stamp. The answer is, that to the amount of these taxes and rates the mortgagee is at all events entitled; that he required no stipulation in respect of them; and that the stamp is regulated by the amount advanced, or agreed to be advanced." The principle laid down in that decision I take to be the true one; that the stamp should be determined by the amount of the sum agreed to be secured, and not by any collateral stipulations which may be contained in the deed. If, therefore, the question before us were res integra, the construction of this statute ought to be as I have stated; and, looking at all the authorities, I think that the last of them has put the matter on its true ground, and consequently there ought to be no rule in this case.

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ALDERSON, B.—I am of the same opinion. The words of the Stamp Act are, "as security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, &c., where the total amount of *money* secured shall be uncertain and without limit." Now "the total amount of money" means the amount secured as money. Here the amount of money secured is expressly limited by the bond. The obligee may no doubt also recover interest and commission; but they are not mentioned in the statute; the amount which is to regulate the stamp *excludes* them. Unless they were clearly included, the subject ought not to be taxed in respect of them; but they are expressly excluded. Commission is a compensation for labour, and is not money advanced, lent, paid, or due on an account current.

PLATT, B.—I quite concur in the interpretation put by the rest of the Court upon the statute. It is remarkable



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that the words are, "bond given for *repayment* of money." The word "*repayment*" cannot apply to commission or to interest: the only mode, therefore, of construing the clause, according to the ordinary interpretation of words, is to confine it to the principal sum which is intended to be secured, and which alone is to be *repaid*.

Rule refused.

Jan. 19.

SANDERS, Executrix, v. JOHN JAMES COWARD.

Debt on bond. The defendant, after cravingoyer of the bond and condition, which was for payment of money pursuant to the covenant in an indenture of even date with the bond, and for performance of the covenants &c. contained therein on the part of the obligors, pleaded that no cause of action in respect of the said writing obligatory, by reason of any breach of the said condition, or of the covenants &c. in the said indenture contained, had accrued at

DEBT on bond by the plaintiff, as executrix of E. L. Sanders, the surviving obligee.

The defendant cravedoyer of the bond, and of the condition, which was as follows:—

"The condition of this obligation is such, that if the above bounden John James Coward, his heirs, executors, or administrators, do and shall well and truly pay or cause to be paid unto the above-named E. L. Sanders and C. R. Sanders, their executors, &c., the sum of £670, with interest &c., on the first day of February next, according to and in full performance and discharge of the covenant or condition mentioned in an indenture bearing even date with these presents, made or mentioned to be made between the said J. Coward of the first part, the said J. J. Coward of the second part, S. Dingle of the third part, and the said E. L. Sanders and C. R. Sanders of the fourth part; and do also well and truly observe, perform, fulfil, and keep all and singular the covenants, grants, articles, conditions, and

any time within twenty years next before the commencement of the suit.

*Held*, that the plea was bad, first, for not setting out the indenture, as it might contain impossible covenants, in which case the bond would be single, and the plea to the breaches only would be bad; secondly, in not properly confessing a breach of the condition.

*Semble*, the proper form of plea would have been, to set out the indenture; to aver performance of all that was performed within twenty years; to admit the breaches beyond twenty years; and to those breaches to plead the Statute of Limitations.

agreements whatsoever, which on their parts and behalves are or ought to be observed, performed, fulfilled, and kept, comprised and mentioned in the said recited indenture, and that in all things according to the true intent and meaning thereof and of the parties to the same, then this obligation is to be void, or else to remain in full force and virtue."

The defendant then pleaded, "that no cause of action in respect of the said writing obligatory, by reason of any breach of the condition of the said writing obligatory, or of the said covenants, grants, articles, conditions and agreements, or any or either of them, in the said indenture, in the said condition mentioned, contained, has accrued at any time within twenty years next before the commencement of this suit."

Special demurrer, assigning for causes, (inter alia), that the plea is not good as a plea by way of confession and avoidance, nor by way of denial of the alleged cause of action, and that it is consistent with the terms of it that it should be taken as a denial that a cause of action ever arose.—Joinder in demurrer.

In the sittings after last Michaelmas Term, (*Dec. 1*)

*Montague Smith* argued in support of the demurrer.—This plea is framed upon the stat. 3 & 4 Will. 4, c. 42, s. 3, which limits the time of bringing actions of debt on a bond or other specialty to twenty years "after the cause of such actions or suits:" and it is a bad plea, for not *confessing* a cause of action. It is consistent with all the statements in the plea, that no breach of the bond whatever had at any time been committed. The proper form of plea would have been, to have confessed one or more breaches, and then to have alleged that they took place more than twenty years before the commencement of the suit. The plea, as it stands, subjects the plaintiff to great difficulty and embarrassment as to the mode of replying. For example, the 5th section of the 3 & 4 Will. 4, c. 42, makes an acknowledgment in

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writing within the twenty years an answer to the plea of the statute of limitations. How is the plaintiff to reply such acknowledgment to this plea, which does not admit any breach of the condition at all? It is plain that the plea would be proved in its terms by evidence of general performance. In substance it is the same as the plea which the Court have already, in this case, held to be insufficient (a). *Webb v. James* (b) is an authority to shew that the statute of Will. 3, does not authorise any double pleading, except the multiplication of such breaches as could properly have been assigned at common law. If therefore the plaintiff have several answers to the statute, as to different breaches, he cannot reply them all. The defendant should have set out the breaches, and averred performance as to those which he alleges he has performed, and pleaded the statute of limitations as to the residue.

Secondly, the plea is bad in substance, for not setting out the indenture. It may be that the deed contained conditions or covenants which were impossible at the time of making the bond, in which case the bond would be single: Com. Dig., Condition, (D. 1). The defendant is bound to get rid of the whole obligation contained in the condition: *Ashbee v. Pidduck* (c).

*Watson, contra.*—Since the statute of 8 & 9 Will. 3, the pleadings in an action of debt on bond are altogether anomalous. According to the former decision of the Court in this case, the cause of action, in debt on bond, is not the original forfeiture of the bond, but any breach of the condition. It is said that this plea does not confess and avoid. But the answer is, that this plea of the statute of limitations is not a plea in confession and avoidance, but a statutable defence, of the same nature as the plea of *non assumpsit infra sex*

(a) *Sanders v. Coward*, 13 M. & W. 65.

(b) 8 M. & W. 645.

(c) 1 M. & W. 564.

*annos*; which puts it upon the plaintiff to prove two things, first, that there was a cause of action, and secondly, that it accrued within the six years. It is different from the plea of *actio non accrevit infra sex annos*. [Alderson, B.—*Non assumpsit infra sex annos* certainly cannot be considered as a plea in confession and avoidance, because it is proved by *non assumpsit*. Parke, B.—And it need not conclude with a verification (a).] Here, therefore, the defendant in effect says by his plea, that there is no cause of action by any breach within twenty years, and puts the plaintiff to prove the affirmative of the whole of that proposition. The only difficulty arises from the anomaly of the pleadings in debt on bond, in which case only it is not necessary to allege a breach in the declaration. If the defendant had confessed a breach of the condition, and said it was not within the twenty years, that would not have been enough; he must have gone on to say there was *no other* breach within twenty years. Suppose there had been fifty breaches, all beyond the twenty years; the defendant must plead according to the truth; and how is he to know which breach the plaintiff is going for? What difficulty is there in the plaintiff's replying, that the cause of action, by reason of the breaches of which he complains, did accrue within twenty years, and then suggesting those breaches on the roll? [Rolfe, B.—Suppose he is going for a breach which accrued beyond the twenty years, but seeks to take it out of the statute by an acknowledgment within the twenty years.] He may reply that; the stat. 3 & 4 Will. 4, c. 42, s. 5, expressly enables him to do so. [Alderson, B.—But suppose he is going for *three* breaches, all above twenty years old, but he relies, as to each of them, on some specialty to defeat the statute; how is he to reply so as to have the benefit of all three? Suppose, as to one, the statute is prevented from applying by the plaintiff having been under disability, and as to the

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(a) *Bodenham v. Hill*, 7 M. & W. 274.

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others by an acknowledgment in writing,—he cannot reply both: but if you set out the breaches in your plea, and aver performance as to those which you say you have performed, and the statute of limitations as to the residue, the plaintiff is relieved from this difficulty.] It may be just the same in a case of goods sold: they may have been sold and delivered in different years; but the plaintiff must distribute them in his replication, and say, as to the first, I was non compos; as to the second, I was beyond seas; as to the third, I have an acknowledgment in writing. The plaintiff must make a special replication of the breaches, and state as to each of them his answer to the statute. If each successive breach is a cause of action, as this Court has already said, that consequence seems to follow. If it lies on the defendant to plead to all the breaches, it will lead to infinite prolixity of pleading; for he must answer every imaginable breach. What breach the plaintiff is proceeding for is purely in *his* knowledge, and it is for him to allege it. Nay, the condition may be for the performance of acts by a third party, of whose breaches of the condition the defendant cannot be informed.

But if it is necessary that the defendant should confess and avoid, this plea sufficiently does so. “Confession and avoidance” merely means that the party must confess the previous pleading, and avoid it by some statutable or common-law defence. The defendant does so here. He confesses his execution of a money bond, which is all that the plaintiff alleges, and shews a complete avoidance of the action founded upon it. The plaintiff’s argument is, that the defendant is to confess something not alleged, or not within his knowledge. This plea is in conformity with all pleas of the Statute of Limitations since the statute of James 1, and casts no more difficulty on the plaintiff than other pleas of the same kind. [*Parke, B.*—What do you say to the other objection, that the indenture is not set out?] It is the deed of the defendant in the hands of the plaintiff, and

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the defendant has not the means of stating it. [*Parke*, B.—In a plea of performance, you must set out the indenture, or excuse yourself from doing so by stating that there were no negative or alternative covenants in it: *Earl of Kerry v. Barter* (a).] Before he can do so, the defendant must have the deed. [*Parke*, B.—He is a party to it. *Alderson*, B.—The Court would order it to be produced to him, if there were only one part of it.] At all events, this is only matter of special demurrer, and there is no demurrer on this ground. [*Alderson*, B.—The objection is, that it might appear to be a single bond if the indenture were set out: that is matter of substance. If you say it is a bond subject to a condition, you must set it out to shew that; because, if the condition be impossible, it becomes a single bond. *Parke*, B.—The reason given in the cases for setting it out applies to a plea of performance; because, until it is set out, it does not appear but that there may be negative or disjunctive covenants, to which case a plea of performance does not apply. The question is, does the same necessity exist where you confess the bond, and excuse its non-performance? It is said that it does, in order to shew that it is not a single bond.] The reason for so pleading does not apply where the defendant says that no cause of action by reason of any breach, whether by doing or omitting anything, accrued within twenty years. The Court will not intend that there might have been something impossible to be performed, and so that the bond is single. If it be so, it is for the plaintiff to set forth the indenture, and aver the fact.

*Montague Smith*, in reply.—The plea of the Statute of Limitations is clearly a plea in confession and avoidance. No doubt, on a plea of non assumpsit infra sex annos, it lies on the plaintiff to prove a promise, and that within the six

(a) 4 East, 340.

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years ; but this arises from the very nature of things, because the one proposition is involved in the other ; but, if it ends in an acknowledgment, the plaintiff does not prove the original promise. A plea that the supposed debt, "if any such there be," did not accrue within six years, was held bad, as not containing a sufficient *confession*: *Margetts v. Bays* (a). Suppose a declaration on a promissory note, and a plea of the Statute of Limitations, would it be necessary to prove the signature of the defendant to the note ? It is said on the other side, that the breaches of the bond lie in the plaintiff's knowledge ; but that is not so in the case of a condition, the performance of which is to defeat the bond : the defendant must shew performance, or an excuse for non-performance, good in omnibus. In principle, there is no greater difficulty in this than in any other case of *excuse* : the defendant must equally go through every condition which he has reason to believe the plaintiff means to complain that he has broken : *Meredith v. Alleyn* (b), *Webb v. James* (c). The defendant has contracted to pay money unless he does such and such things ; then it lies on him to get rid of that obligation, and to shew that he has done all those things, or excuse himself for not having done them. The ordinary rule of pleading is no doubt reversed in the case of debt on bond ; that is an anomaly, but it is so established. The defendant must allege his excuse as to each breach, and then the plaintiff is put under no difficulty in replying. On the other hand, there is no difficulty upon the defendant, other than that which he incurs by entering into such a contract. Suppose, under this plea, the defendant proved that there never was any breach of the condition, he would say he had a right to succeed upon it. [*Parke, B.*—Yes, that is the real objection ; the plea would be proved by proof of general performance.]

(a) 4 Ad. & E. 489 ; 6 N. & M. 228.

(c) 8 M. & W. 645 ; see 2 Saund. 107 b, n. (3).

(b) 1 Salk. 138 ; Carth. 116.

Secondly, no answer has been given to the objection that the deed is not set out. The defendant cannot shew the *excuse*, without shewing what he had to *perform*. [*Alderson*, B.—Suppose there were a plea of performance of all except conditions A, B, and C; and as to those, that the breach of them was beyond twenty years,—which you admit would be a good plea,—how would you reply?] The plaintiff would have a right to answer each. [*Parke*, B.—No; he must deny one, and suggest the others: *Webb v. James*.]

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But, further, the defendant has not pleaded to the obligatory part of the bond at all; because everything as to the *breaches* may be mere surplusage, and totally beside the cause of action.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case was argued before my Brothers *Alderson*, *Rolfe*, *Platt*, and myself, at the sittings after the last term. [His Lordship stated the pleadings, and continued]—There had been a plea to the same declaration, and a special demurrer to it, which came before the Court in Trinity Term, in the year 1844, and the Court held the plea to be bad for uncertainty, but gave the defendant leave to amend. The amended plea being now demurred to specially, two objections were taken to it: one, that the plea ought to have set out the indenture at length; the other, that the plea, that no action accrued by reason of a breach of the condition within twenty years, was bad in form, as not being good by way of confession and avoidance, or denial.

The first of these objections, which was not the principal one, insisted upon by Mr. *Montague Smith*, ought, we think, to prevail. It is perfectly settled (a) that the in-

(a) *Earl of Kerry v. Baxter*, 4 East, 340; *Alleyn*, 72; 1 Sid. 425.



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indenture ought to be set out, where performance is pleaded, because it might contain negative or alternative covenants, or, as Lord *Coke* says (*b*), a covenant for something to be done of record; in all which three cases, performance must be pleaded specially. Where, however, performance is not pleaded, but non-performance excused, the same reason does not apply; but then it is insisted that the indenture ought to be set out, that the Court may see that it contains covenants, all of which were, at the time of the making of the bond, capable of being performed; for if any one was impossible, the bond would be single, and if so, the plea, which relates to the breaches only, is bad. And we think that this is a good reason for requiring the indenture to be set out; and it should be so done, if the defendant amends, as we propose to give him liberty to do.

The next and principal objection was to the form of the plea, which states that no cause of action by reason of any breach of the condition of the writing obligatory, or of the covenants in the indenture, has accrued at any time within twenty years next before the commencement of the suit. We think this plea is bad in form.

In construing the third section of the 3 & 4 Will. 4, c. 42, it seems to us that the limitation in an action on bond, of "twenty years from the cause of action or suit," is not to be confined to twenty years from the first breach of a condition to do various things, any more than it would be confined to that period from the first breach of a covenant to do various things, in an action of covenant. Although, on the first breach of the condition of a bond, the obligee may sue the obligor, and have judgment under the statute of 8 & 9 W. 3, c. 11, as a security of a higher nature for future breaches, he is not bound to pursue that course. He may waive the right of action on the bond, in respect of the first breach, or any number of breaches, and be contented

(*b*) Co. Litt. 303. b.

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with the specialty security only for future breaches, and sue afterwards on a subsequent forfeiture, and assign that for a breach. If it were not so, the inconvenience would be considerable, and the value of a security by bond diminished; and it is to be observed, that the limitation in the statute is not from the cause of action *first* accrued on the bond, but generally from the cause of action; and this construction leaves the obligee much in the same situation as before the act, except that the statute gives to the lapse of time the effect of an absolute bar to the remedy, instead of its being used as evidence of payment or performance of the condition, as it would have been before. If before the statute there had been a bond for the payment of twenty annual instalments, the lapse of twenty years from the time fixed for the payment of each instalment would have been good evidence to raise a presumption of the due payment of each instalment; but the right to recover the instalments due within twenty years would be unaffected.

The supposition, therefore, on which the plea is framed, viz. that, to constitute a bar under the statute, *every* breach of the condition ought to be shewn to have been beyond twenty years, not the first only, is correct. But we think the plea is bad in form. It is not clear whether its meaning is, that every condition or covenant was to be performed, and was broken more than twenty years ago; or that, for the last twenty years, every condition and covenant has been duly performed; and if the latter is the meaning, it is an incorrect form of pleading. For the bond binds in the first instance, and the defendant must exonerate himself by pleading performance, if he means to insist that the bond has not been forfeited: he cannot be allowed to say there has been no breach of the bond generally, and throw it on the plaintiff to prove there has been a breach; but he must shew by proper affirmative pleading that the condition has been duly performed; and this circumstance makes a difference in the form of a plea of the new Statute of Limita-

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tions to an action in the old form on a bond with a condition, and to an action of covenant, setting forth, as it must do, the breaches which the plaintiff insists upon; as to which there would be no difficulty in pleading, in the ordinary form, that the causes of action in the declaration mentioned did not accrue within twenty years; nor would there probably be any in adopting a similar plea in the case of an action on a bond, stating the breaches in the declaration.

We think, therefore, that the plea cannot be supported, and our judgment must be for the plaintiff: but the defendant may have liberty to amend on the usual terms.

What the form of amendment should be must depend upon the nature of the covenants and the facts; but the defendant's counsel will consider whether the plea, which should set out the indenture, should aver performance of all that was performed within twenty years, and admit the breaches beyond that time, and to those breaches plead the Statute of Limitations.

Leave to the defendant to amend on payment of costs; otherwise

Judgment for the plaintiff.

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## WELCH v. VICKERY.

Jan. 21.

COLE moved to set aside the taxation of the plaintiff's costs, and for a retaxation of such costs, no notice of taxation having been given to the defendant or his attorney, pursuant to the rule of Trinity Term, 1 Will. 4, s. 12. The plaintiff had appeared for the defendant *sec. stat.*; after which, the defendant's attorney had taken the declaration out of the office, and obtained and served two summonses for time to plead. The rule of Hilary Term, 4 Will. 4, s. 17, renders a notice of taxation unnecessary, in any case where the defendant has not appeared in person or by his attorney or guardian notwithstanding the former rule: *Pope v. Mann* (a), *Bolton v. Manning* (b), *Burch v. Pointer* (c). But it is submitted, that the taking out and serving a summons for time to plead by the defendant's attorney was tantamount to an appearance, within the principle of *Lloyd v. Kent* (d).

No notice of taxation is necessary, where the plaintiff appears for the defendant *sec. stat.*; although the defendant's attorney afterwards takes out and serves a summons for time to plead. Such summons is not tantamount to an appearance, within the rule of Hilary Term 4 Will. 4, s. 17.

PARKE, B.—In that case a judge's order was drawn up upon hearing both sides,—but here a mere summons has been taken out, and served by the defendant's attorney. That is not tantamount to an appearance. No order for time was obtained. Besides which, there appears no reason why a summons for time taken out by the defendant's attorney should have any greater effect with reference to the rule of Hilary Term, 4 Will. 4, s. 17, than a summons taken out by the defendant himself: *Pope v. Mann*.

PER CURIAM,

Rule refused.

(a) 2 M. &amp; W. 881.

(c) 3 M. &amp; W. 310.

(b) 5 Dowl. P. C. 769.

(d) 5 Dowl. P. C. 127.

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In an information by the Attorney-General for penalties for a breach of the revenue laws, this Court has no jurisdiction, on motion by the defendant, either at common law or by statute, to direct a commission to issue for the examination of witnesses abroad; nor will it stay the proceedings until the Attorney-General consents to the issuing of such commission.

## The ATTORNEY-GENERAL v. BOVET.

THIS was an information filed by her Majesty's Attorney-General against Charles Bovet, to recover penalties amounting to 922*l.* 17*s.* 6*d.*, for causing to be entered for drawback a quantity of wine alleged to be of less value than the amount of such drawback. The defendant pleaded not guilty, on which issue was joined; and notice of trial having been given,

*Greenwood*, in Michaelmas Term last, moved, on the part of the defendant, for a rule calling upon the Attorney-General to shew cause why a commission should not issue for the examination of one Louis Clerc as a witness for the defendant. The motion was founded on an affidavit made by a clerk of the defendant's attorneys, which stated, "that Louis Clerc, of Fleurier, in the canton of Neufchatel, in Switzerland, is a material and necessary witness for the said C. Bovet on this information, as this deponent is advised and verily believes; and that the said C. Bovet cannot safely proceed to the trial of the said information without the evidence of the said L. Clerc; and further, that he is advised, and verily believes, that the said C. Bovet will be able to prove, on the trial of this information, by the evidence of the said L. Clerc, if a writ of commission for the examination of the said L. Clerc, at Fleurier as aforesaid, be permitted to issue, by whom the said quantity of wine, to which this information relates, was caused to be entered for drawback, and conclusively to establish that the same was not caused to be entered for drawback by the said C. Bovet, as alleged in this information." The affidavit then stated, that L. Clerc was not likely to return to this country until after the trial; that there was no intention to create delay; and that the defendant had a good defence to the information on the merits.

At the suggestion of the Court, the Attorney-General consented to a rule being granted, to shew cause "why a commission should not be issued out of and under the seal of this Court, for the examination, upon interrogatories, of L. Clerc, of &c., a material and necessary witness on the defendant's behalf, and why such examination, when so taken, should not be read as evidence on the trial of this cause."

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The *Attorney-General*, the *Solicitor-General*, *Jervis*, and *J. Wilde*, now shewed cause.—This application cannot be sustained. It is founded upon the provisions of the stat. 1 Will. 4, c. 22, which, by the first section, extends the enactments of the 13 Geo. 3, c. 63, relating to the examination of witnesses in India, to all the foreign possessions of the Crown, and "to all actions depending in any of his Majesty's courts of law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for." On moving for this rule, the case of *The Attorney-General v. Laragoity* (a) was cited, the circumstances of which were as follows:—It was a question that arose out of the seizure, by the officers of the customs, of a ship called the *San Juan Baptista*, charged with having been found armed for resistance, contrary to the statute, whilst belonging wholly or in part to a British subject, and with various other breaches of the navigation laws, some of which were laid to have been committed previously, and others subsequently, to the alleged transfer of her to the foreign subject, who was the

(a) 2 Price, 106, 172.

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claimant under a purchase from the late British owner. On the information being filed, an application was made by the defendant for a commission to examine witnesses at Corunna. The act of Parliament under consideration in that case was the Navigation Act, 13 & 14 Car. 2, c. 11, which provided, "that in case the seizure or information shall be made upon any clause or thing contained in the late act, intituled, 'An Act for encouraging and increasing of shipping and navigation,' then the defendant or defendants should, on his or their request, have a commission out of the High Court of Chancery to examine witnesses beyond the seas &c." Cause being shewn against the rule, it was held, "that it would be departing from the common usage of the Court to grant the application;" and the Court said, "Such motions might in future be made in every case, on a suggestion that material witnesses resided abroad. . . . The Crown has in all cases a right to a vivâ voce examination of the defendant's witnesses. There is, indeed, a case in Bunbury (a) of a commission having been granted by this Court, but that was made on the Navigation Act." The rule was therefore discharged, and the defendant then filed a bill on the equity side of this Court against the Attorney-General; and upon that bill, and upon the terms of the Navigation Act, he moved for and obtained a commission to examine witnesses at Corunna. Now, whether the equity jurisdiction of this Court in matters of revenue is still in existence or not, is a question of much difficulty and importance, which is at present under the consideration of the Court, and which it is unnecessary to enter upon on this occasion, because this is not the case of a bill filed. All the cases cited in *Laragoity v. The Attorney-General*, in which commissions for the examination of witnesses had been directed, were cases where bills were filed; and many of them were cases under the navigation laws, in which, by the express provision of the 13 & 14 Car. 2, c. 11, the party was en-

(a) *Jenkins v. Larwood*, Bunb. 13; post, p. 63.

titled to a commission. But this is an application which must be grounded, if at all, upon the stat. 1 Will. 4, c. 22; and that being so, the case of *Regina v. Wood* (a) is a direct authority against it. It was there expressly held, that in an action at the suit of the Crown, the Court has no power, under the 1 Will. 4, c. 22, at the defendant's instance, to direct a commission for the examination of witnesses. *Parke, B.*, says—"There are no fewer than four decided objections to this application, on the face of the act of parliament. In the first place, upon the preamble, so much only of the 13 Geo. 3, as relates to actions is incorporated in the act; secondly, even supposing that the clause relating to indictments and informations is imported into it, that only gives a mandamus; thirdly, they must be indictments or informations for misdemeanours or offences committed abroad; and fourthly, the clause applies only to indictments and informations exhibited in the King's Bench." There is another case which probably will be relied on for the defendant, that of *Jenkins q. t. v. Larwood* (b). That was an application under the Navigation Act, and it was argued in support of it, that, inasmuch as a commission was by that act to issue out of the Court of Chancery, this Court would, by analogy, have the same power, by reason of its equitable jurisdiction, on the same principle as where by statute analogous powers were held to be granted to different courts of like jurisdiction, although one court only was named. In that case, *Bury, C. B.*, and *Price, B.*, thought that the commission should go, not under the statute, but by virtue of the original jurisdiction. *Fortescue Aland, B.*, thought it might go even upon the statute; *Montague, B.*, was of a contrary opinion on both points. But with respect to that case, it is enough to say that it occurred under the old practice of this Court, when all proceedings were instituted by *qui tam*. In truth, it was a suit between subject and subject, the party suing, by leave of the Attorney-General, by *qui*

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(a) 7 M. & W. 571.

(b) Bunb. 13.



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tam. Moreover, that case was cited, and not acted upon, in *The Attorney-General v. Laragoity*. Even were there no other objection, the Crown, not being expressly named, would not be bound by this act of Parliament, although it might take advantage of it if it thought proper. But it is sufficient to say that the case of *Regina v. Wood* is a direct and recent decision of the Court against this application (a).

*Greenwood*, in support of the rule.—The argument on the other side has proceeded altogether on the supposition that this application rests solely upon the stat. 1 Will. 4, c. 22, but that is not so; it is rather founded upon the general jurisdiction of the Court, at the common law, to grant such relief, which jurisdiction has been exercised in several cases. The proposition advanced on the part of the Crown is, that the Crown may have a commission to examine witnesses in Switzerland in support of this information for penalties, but that the defendant cannot, without the consent of the Crown, obtain the same means of defending himself against it. That is a proposition of an extraordinary nature, and in support of which no conclusive authority has been cited. On the contrary, it is submitted, that when, at the instance of the Attorney-General, this Court at length decided, that, upon motion, the Crown might have an order for the examination of witnesses on interrogatories, it in truth decided in favour of the present application. In the case of *The Attorney-General v. Reilly* (b), which was an informa-

(a) In the course of his argument, *Jervis* referred to two MS. cases, which he had taken from the Registrar's book, and written out in the margin of the case of *Attorney-General v. Laragoity*, at the time of the discussion in *Regina v. Wood*. One was a case in the year 1816, in which a commission was granted in equity, on a bill filed for that purpose;

the other was *Rex v. Arthur*, in which a commission was granted, and witnesses were examined under it before the Remembrancer, but the depositions, when tendered in evidence, were objected to and rejected, on the ground that the Court had no such jurisdiction.

(b) 13 M. & W. 676.

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tion for a breach of the revenue laws, the Court, on motion by the Attorney-General, granted a rule for the examination of a witness in this country before the Queen's Remembrancer. It cannot be contended that there is any distinction between the case of an examination on interrogatories in this country, and an examination under a commission abroad; or that, if the Court has a jurisdiction to order an examination before the Remembrancer, it has not authority to direct the same examination by any other person. Unless, therefore, a distinction can be drawn between an application by motion on behalf of the Crown, and an application by motion on the part of a defendant, the case of *The Attorney-General v. Reilly* really is decisive of the present question. The arguments advanced on the part of the Crown in the different cases have not been very consistent with each other. In *Regina v. Wood*, it was argued that the proceeding was a civil and not a criminal one, and that the only course, in order to obtain a commission, was to file a bill. In *The Attorney-General v. Reilly*, the counsel for the Crown founded their argument upon the existence of a peculiar equitable jurisdiction in this Court, arising from the right of the Crown to collect its revenues, which might be exercised on motion. Now, again, it is argued, as in *Regina v. Wood*, that the application must be by bill. [*Parke, B.*—The Attorney-General says the application may be by motion on the part of the Crown, for the collection of its revenues; but he says that this reason does not apply to a defendant.] The object of the application is the production of evidence before the jury, which cannot be obtained by other means; and surely no distinction can exist in this respect between the case of the Crown and of the defendant. In the case of *The Attorney-General v. Laragoity*, when the original application by motion was refused, no authorities were brought before the Court, except the case in *Bunbury*; but afterwards, when the application was made upon bill filed, the Court directed an inquiry to be made for precedents, and a

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great number of them, from the year 1699 downwards, were brought before the Court (*a*). One of them is the case of *Butts v. Hart* (*b*), in which the commission was granted, and, as it would appear, on motion; and there is no intimation whatever that any resort was had to the equitable jurisdiction of the Court. On the authorities thus collected and brought before them, the Court, in the case of *Laragoity v. The Attorney-General*, acted, and allowed the commission to issue. It has been suggested that that decision proceeded upon the terms of the Navigation Act; but that could not be so, because that act extends only to the Court of Chancery. [*Parke, B.*—It may have been thought that the equity side of this Court was included, the words “High Court of Chancery” being used only as an instance.] The judgment of the Court appears to have proceeded expressly upon the ground of its general *common-law jurisdiction*. The authority of this Court, it is there said, to grant commissions in such cases, “falls in with the general jurisdiction which belongs to it, of aiding by such means defendants at law, in cases where justice and necessity require it.” In *Jenkins v. Larwood*, again, the commission was granted on motion, and so it was understood in *The Attorney-General v. Reilly*, where *Parke, B.*, says,—“The commission in the case of *Jenkins v. Larwood* seems to have issued from this Court as a court of revenue, and not as a court of equity, because it was on motion.” There are, no doubt, cases of prerogative, where the Crown has peculiar rights superior to those of the subject, but it is submitted that this is not among them. In truth, this case may in one sense be considered as one between subject and subject, for the informer is entitled to half the penalty in case of conviction. At all events, the defendant contends that the Court has the same authority, in respect to the examination of witnesses, in a

(*a*) See them collected, 2 Price, 178, et seq.

(*b*) 2 Price, 184.

matter between the Crown and the subject, as between subject and subject,—an authority not founded upon any particular statute, but in the inherent jurisdiction of the Court, which is necessary for the fair and equal administration of justice.

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The *Attorney-General*, in reply.—It is certainly of importance that this question should be settled, and the extent of the authority of the Court should be fully ascertained and established by a deliberate decision. There can be no doubt that the cases of *Regina v. Wood* and *The Attorney-General v. Laragoity* are express authorities against such an application as this, if those decisions are to be adhered to: and it is obvious, that, if such applications are allowed to prevail, the proceedings of the Crown will in effect be stopped and paralysed in every information for breaches of the revenue laws. Much has been said of the “general common-law jurisdiction” of this Court: but, in truth, as a Court of common law, this Court has inherently no greater authority to issue a commission for the examination of witnesses, than the other Courts of common law in Westminster Hall; and if they, in common with this Court, had possessed such a jurisdiction, it is obvious that it would have been wholly unnecessary and superfluous to confer it upon them by statute. If, therefore, this Court has power, independently of the statute, so to act, it must be by reason of its equitable jurisdiction; and with respect to that, it is sufficient to say, that if the equitable jurisdiction of the Court in matters of revenue still remains to it, the proper course has not been taken here to call for the exercise of it. With respect to the cases referred to in *Laragoity v. The Attorney-General*, they are all cases, either upon the Navigation Act, or of application by bill. [*Parke*, B.—There is the case of *Idle v. Westborne* (a), where the trial was postponed on payment

(a) 2 Price, 180.

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of costs, and the plaintiff to be at liberty to examine his witnesses, giving the defendant a note of them.] That case is said to have occurred on the 19th of June, 1724, and therefore certainly might have been in term; if not, it would clearly have been a proceeding by bill. [*Alderson*, B.—The Court, in those days, sat three days in equity in term.] It does not at all appear from the report, in what way the matter came before the Court, or how the proceedings arose. [*Parke*, B.—In another of those cases, *Longman*, q. t., v. *Kemble* (a), this order is said to have been made:—"Ordered, a commission ret. sine delatione, and the trial put off till the sittings after next term; and that the defendant have a writ of delivery, by consent, on giving the usual security."] The *consent* mentioned in that order may have had reference to the whole matter: at all events, the report does not shew what was the nature of the proceeding, and at that time of day the proceedings in equity were by *qui tam*. With respect to the case of *The Attorney-General v. Reilly*, it is really no authority at all for the defendant. There the Lord Chief Baron, in granting the application, says,—“We at present pronounce no rule as to the result of the examination at the trial. It appears to us that the question is not to be disposed of on motion. The officers of the Crown are to have the power of examining the witness, and the defendant will be at liberty to except to the reception of that evidence, in the same way as he would be allowed to do at the trial. The rule, therefore, will be absolute so far as relates to the examination.” [*Parke*, B.—Before the late statute, it appears to have been the practice to stay the proceedings, unless the plaintiff would consent to the examination of the witnesses on interrogatories.] But it is clear that the Courts had no authority, at common law, to direct a commission to issue for the examination of witnesses abroad. [*Parke*, B.—No, unless by consent; but they used

(a) 2 Price, 181.

all the powers they had in favour of the defendant, unless the plaintiff would consent. That may explain the cases which appear to have occurred on motion.] It is for this defendant to establish that the Court has a jurisdiction, either by common law or by statute, to issue a commission to examine witnesses out of its jurisdiction, or else that its equitable jurisdiction still subsists, and that by virtue of that jurisdiction he has a right to this relief on motion. No authority can be adduced in favour of either of these propositions, and therefore it is hoped, for the sake of preventing the Crown from being impeded in cases of this nature, where it is suing for the benefit of the public, that the present application will be refused. [*Parke, B.*—With respect to the case of *The Attorney-General v. Reilly*, that was decided as it was, merely because, if we had decided it against the Crown, there was no appeal; whereas, if it were decided in favour of the Crown, the witnesses might be examined on interrogatories, on the ground that it was part of the ancient jurisdiction of the Court that an examination might take place on interrogatories before an officer of the Court; and whether that was part of the ancient jurisdiction not taken away by the Act of Parliament, might afterwards be decided by a court of error.]

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*Moseley*, amicus curiæ, referred to a passage in Bracton, (f. 107), where the doctrine was stated, that, unless the Courts have power to compel parties to comply with their orders, they have no jurisdiction:—"Oportet et ille qui judicat, ad hoc quod rata sint judicia, habeat jurisdictionem ordinariam vel delegatam, et non sufficit quod jurisdictionem habeat, nisi habeat coercionem; quod si judicium suum executioni demandare non posset, sic essent judicia delusoria." And again, "Sunt enim causæ spirituales, in quibus judex secularis non habet cognitionem nec executionem, cum non habeat coercionem."]

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POLLOCK, C. B.—This is an application in a case in which the Attorney-General, on the part of the Crown, has filed an information against the defendant for penalties. No direct authority has been cited by the defendant in support of the application, although, if the Court had the power to grant it, there would scarcely have been an instance in which such an application would not have been made to the Court, to exercise its discretion on behalf of a defendant. It may be a very proper jurisdiction for the Court to possess; but if so, it must be conferred upon the Court by the legislature. There is no case which authorises the Court so to act. All the cases in which the Court appears so to have interfered, have been either where bills have been filed on the equity side of the court, or where there has been a consent. In the present case, where the Attorney-General is suing on the part of the Crown, I am clearly of opinion that the defendant has no right to stop the Crown from going on with the suit, until the Crown shall have consented to something which the Court has not the power to grant. In the case of *Calliand v. Vaughan* (a), the Court of Common Pleas declined to interfere to put off a trial, or use any indirect means to compel a party to consent to a commission for the examination of a witness in Scotland. The Court seemed to think that the plaintiff was entitled to stand upon the rights which belonged to him as a suitor in the court; and Lord Chief Justice *Eyre* is there reported to have said:—"The plaintiff thinks fit to stand upon his rights; he refuses to consent, and we are called upon for a decision. The question then is, whether the Court should, under the circumstances of this case, give the defendant till next term to enable him to apply to a Court of equity." But the Court refused to interfere, even between subject and subject, to put off the trial, in order to compel the party to consent; which, in other words, is nothing more than this—

(a) 1 Bos. & P. 210.

“ We will not use a power which we have, for the purpose of indirectly exercising a power which we have not;” and that, as it appears to me, was a most proper and correct decision. A fortiori, in a case where the Crown is concerned,—in a matter of revenue,—it would be extremely improper to use any of the authority which undoubtedly belongs to the Court, for the purpose of indirectly coercing and compelling the Attorney-General to take a course which we have not the power to order him to take directly. With respect to the common-law jurisdiction of the Court to exercise this power, I have no doubt that that jurisdiction does not exist. I believe it will be found to be true, almost without exception, that the common law of England takes no notice of any other country, any other law, or any other usage than our own. It recognises, indeed, the residence of foreigners among us, but it takes no notice, apparently, of the law or the usages of any other country, and nearly the whole of the common law seems to have been framed and established, as if there had been no other country in the world but England itself. I apprehend, therefore, that we have no common-law jurisdiction to send a commission into a foreign country, there to examine witnesses, nor any power there to administer an oath, the common law not recognising the authority of anybody out of this country to administer one. Upon that point I feel, upon principle, no doubt whatever. But the refusal of the rule may, with perfect safety, be put upon this ground,—that there really is no authority whatever to be found in the books for the exercise of this power on the part of the Court, and it is of such a description, that if it had belonged to the Court, the instances in which the application would have been made, and the practice established, would have been so numerous, and the circumstances under which such a commission would issue would have been so settled, that long ago, with reference to the issuing of such a commission, it would have been a branch of the law in this Court, established by a multiplicity

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of decisions. Upon these grounds, both upon principle and upon authority, I am quite satisfied that we do not possess this jurisdiction, unless by its being on the equity side of the court. Whether that equitable jurisdiction in matters of revenue still exists or not, is at this moment the subject of consideration in the Court; but with reference to the present application, that question does not arise. I am of opinion, therefore, that the rule should be discharged.

PARKE, B.—I am of the same opinion. With respect to the right under the statute, it is perfectly clear, since the case of *Regina v. Wood*, that the defendant has no such right, and the motion certainly cannot be sustained upon the ground that the statute gives him any. The only question is, then, whether he has any by the common-law jurisdiction of this Court. Whether he has any by the *equitable* jurisdiction, is a matter upon which I pronounce no opinion, because, whether a bill would lie for the purpose of examining a witness for the defendant is a point which is not yet settled; but I am on the present occasion to ask myself the question, whether, *at common law*, the Court has such a jurisdiction as it is now asked to exercise. There is no doubt that Lord *Mansfield* in his time went considerable lengths to give a defendant the same relief in a court of law, which he would have upon a bill filed: he went so far as this, in a case mentioned by himself in *Mostyn v. Fabrigas* (a), “of a criminal prosecution of a woman who had received a pension as an officer’s widow, and it was charged in the indictment that she never was married to him. She alleged a marriage in Scotland, but that she could not compel her witnesses to come up to give evidence. The Court obliged the prosecutor to consent that the witnesses might be examined before any of the judges of the Court of Session, or any of the barons of the Court of Exchequer in

(a) Cowp. 174.

Scotland, and that the depositions so taken should be read at the trial: and they declared that they would have put off the trial of the indictment from time to time, for ever, unless the prosecutor had so consented." That certainly was going a great length,—to an extent, unquestionably, which has not been followed in modern times. I quite concur in the observations which my Lord has made upon the case in the Common Pleas, where that Court refused to do indirectly what they had no power to do directly, viz. to put off the trial of a cause in order to compel the plaintiff to consent to the examination of witnesses under a commission. Now, that being so, let us see whether there are any precedents of such a proceeding as this in this Court. The case of *Laragoity v. The Attorney-General* is a case directly in point, because this Court, upon motion applicable to their common-law jurisdiction, refused to interfere. It has been observed with respect to that case, that several authorities were cited upon the argument on the equity side of the Court, and that if they had been brought before the Court at the time of the motion on the common-law side, the Court would probably have granted the application. Now, I have looked through those precedents, and there appear to be only two which give a colour of support to such an application. Taking the majority of them, they are cases in which a bill has been filed; but there are two in which it does not appear upon the order that a bill had been filed. Whether those two proceeded upon the ground that the plaintiff, or the Crown on behalf of the plaintiff, consented, does not distinctly appear. It may have been a matter perfectly agreeable to the Crown that such a commission should issue, and there certainly is not a single case of any interference on the part of this Court to stay the proceedings on the part of the prosecutor, where the Crown or the prosecutor was unwilling to consent. If that be so, there is no authority in support of this application; and I think the application ought to be dismissed, without considering whether

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this would be a fit case for the Court to interfere, if a bill in equity had been filed.

ALDERSON, B.—I am of the same opinion. I do not think we have any jurisdiction by the common law. No authority has been cited to induce me to come to that conclusion. One may very well understand all the cases mentioned in *Laragoity v. The Attorney-General*; my belief is, that they were all on the equity side; they were all cited in an equity case, and every one of them may have been such; though, from the short way in which they are reported, one is not quite certain what they were. The greater part of them were certainly upon bills filed; and with respect to the two in which that does not appear, if they were upon the common-law side, they are simply applications on the part of the defendant to put off the trial, and then the Court, upon his making that application, refused it, as well they might, unless he would consent to a commission issuing for the purpose of the examination of witnesses by the other side. But there there is a common-law jurisdiction,—there is the “coercion” which the learned gentleman has referred to, as well as the power of directing the thing to be done. I apprehend the “coercion” spoken of by Bracton is simply a coercion where the party is before the Court. If the one party who applies, and the other party who is against the rule shewing cause, are both subject to the coercion of the Court, the Court have that coercion which gives them jurisdiction. It does not at all apply to witnesses who are the subject of a commission, because nobody can doubt, if two English subjects suing in this Court have a commission issued for the examination of witnesses in China, that will not give the Court coercion over the Chinese parties; the coercion exists only over the two contending parties before them. This, I apprehend, is the explanation of the difficulty which is suggested to the Court by the passage cited from Bracton. And with respect to the cases, it appears to me,

I confess, that they afford such reasons as satisfy me that we have no such jurisdiction as that which is now claimed.

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PLATT, B.—I agree entirely in all the observations of my learned Brothers, and will only add one or two words. In the case of *Regina v. Wood*, it is remarkable that the learned counsel based the whole of his argument upon two statutes, namely, the 13 Geo. 3, and the 1 Will. 4, never dreaming that there was an original jurisdiction in this Court, to which he might have referred, and might have saved himself the trouble of founding an argument upon those statutes. That likewise is the ground upon which the Court proceeded, and we can hardly suppose, if any such jurisdiction as this had ever been exercised, that the defendant should not have been able to have cited something to the Court, for the purpose of guiding them to that conclusion. But there is an absence of all such precedents. With respect to the passage cited from Bracton, it appears to me that the power of “coercion” cannot be taken so extensively as it is sought to be applied; for let us see whether it is true that the Court has a power of coercion co-extensive with its jurisdiction. The Court has power to direct the examination of witnesses abroad, under the statute of 1 Will. 4. Has it the power of compelling the witnesses to attend? Certainly not. So, until the late act, although the Court had power to refer cases, they had no power of compelling witnesses to appear before the arbitrator. Therefore it does seem that that passage must be taken with some considerable limitation, in order to its being applied to any case that may be brought before the Court. It seems to me, I own, to be clear that the Court has no such jurisdiction as that which is contended for; and that being the case, this application cannot be maintained.

Rule discharged.

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Jan. 24.

HIGGINS v. EDE and Another.

In an action by an engineer against the committee of a Railway Company for making the survey, &c., the particulars of demand merely claimed certain aggregate sums in respect of the survey of a stated number of miles, and for tavern and travelling expenses, assisting the solicitor with books of reference, engraving plates of plans, printer's account, &c. The Court refused to order fuller particulars.

**ASSUMPSIT** for work and labour and materials, money paid, &c., brought against the defendants as provisional committee-men of the Derby, Uttoxeter, and Stafford Railway Company. The following particulars of demand were delivered with the declaration:—

“Higgins v. Ede and Illidge.

“This action is brought to recover the amount of the following items of account:—

	£	s.	d.
1845. June. A preliminary survey of the Derby, Uttoxeter, and Stafford Railway, including the examination of the country, taking the trial sections, attending public meetings at Uttoxeter, attending committees and other meetings, tavern, and other travelling expenses . . . . .	343	0	0
November 4. The survey of 36½ miles . . . . .	1460	0	0
The survey of the Burton branch; also the alternative line B, from Finden; also alternative line C, to Baswick; also alternative line D, to Grand Junction Railway; 10½ miles in all . . . . .	630	0	0
November 7 to 30. Time and expenses of surveyors, and assisting the solicitor with books of reference, both in the country and in London . . . . .	320	0	0
Engraving 33 plates of plans . . . . .	825	0	0
Paid for copper plates . . . . .	129	0	0
Printer's account . . . . .	67	4	0
	<hr/> £3774 0 0		

“Above are the particulars of the plaintiff's demand in this action,” &c.

The defendants afterwards took out a summons for further and better particulars, which was heard before *Alderson*, B., who declined to make any order.

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*James* now moved for a rule nisi for the same purpose, on an affidavit of the defendants' attorney, that they had not seen any of the work done, nor seen any of the books of reference, and unless fuller particulars were delivered, they could not prepare their defence, nor ascertain the amount that it might be expedient for them to pay into Court. He urged that the bill of particulars gave no definite information whatever; that it did not state what time was expended on the survey, who were employed upon it, or the rate of charge per mile; nor how many books of reference were delivered, or at what time, or what was the nature of them.

POLLOCK, C. B.—I think there is no ground for this application. The work done in this case embraces a great number of items, and the case is like that of an action for goods sold and delivered, where the particulars state generally that the action is brought for goods sold at certain dates. It is said the plaintiff ought to state how much he charges per mile for the survey; but there might be great difficulty in making out a bill of particulars of that kind, because the trouble of making the survey may vary very much in different places. With respect to the books of reference, the provisional committee-men of a railway must know very well what is their nature, and that the standing orders of the Houses of Parliament require them to be deposited with the clerk of the peace and parish clerks for inspection. If the defendants can amend their case, they may apply on fresh affidavits at chambers; but, at present, I think there ought to be no rule.

PARKE, B.—I am of the same opinion. The plaintiff has furnished a general account of the nature of his demand,

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which is quite sufficient. He states that he claims in respect of a survey made for this line of railway, and gives the number of miles surveyed. With respect to the books of reference, the defendants, to whom they were supplied, must be taken, *prima facie*, to know the nature of them, and the number that was required.

PLATT, B., concurred.

Rule refused.

Jan. 27.

RENNIE and Another v. BERESFORD and Others.

In an action by an engineer against the committee of a railway company, for making the survey, &c., the particulars of demand claimed an aggregate sum for surveying and levelling the line, making trial sections, finding surveyors, levellers, and engineers, meeting and arranging with the solicitors, assisting at the reference, superintending the engravings, &c. &c., including tavern bills, travelling charges, office expenses, &c.

**ASSUMPSIT** for work and labour and materials, money paid, &c., brought against the defendants, as members of the managing committee of the Leeds and Carlisle Railway Company. The following particulars of demand were delivered with the declaration :—

“ Between Sir George Rennie and Sir John Rennie,  
Plaintiffs,  
and  
W. Beresford, J. Clay, R. Dutton, and J. Underwood,  
Defendants.

“ This action is brought to recover the sum of £6855, the balance of the under-mentioned account, delivered by the plaintiffs to the defendants in the month of December last, with interest thereon, at the rate of £5 per cent. per annum, from the 10th of January instant, until payment.

&c.,—so many miles, at a certain sum per mile. The Court refused to order fuller particulars, or to compel the plaintiff to distinguish between his own personal charges and those of the surveyors &c. employed by him, or to particularise the sums actually expended by him.

Leeds and Carlisle Railway Company,

To Messrs. George and John Rennie.

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£ s. d.

1845. Between the 18th September and 30th

November:—To preliminary survey and examination of the country between Leeds and Carlisle, in order to determine the best line, including travelling charges and assistance - - - - -

250 0 0

1845. Between 27th September and 30th

November:—To personally examining the country between Leeds and Carlisle, making sundry trial sections, laying out the main line, finding surveyors, levellers, and engineers, superintending the same, meeting the solicitors, arranging with them, and assisting at the reference, taking all the cross sections of the roads, and making the proposed alterations therein, getting out the finished plans and sections, furnishing the solicitors with tracings to take their reference, meeting solicitors, and putting numbers on the plans to correspond with the reference, laying out all the gradients and curves on the plans and sections, superintending the engravings, and furnishing the engraver from time to time with the requisite plans and sections, correcting the proofs, sundry meetings with the chairman and committee of selves and assistants, and generally directing and superintending all the different departments of surveying, levelling, engineering, and engraving, &c., including tavern bills, travelling charges, and office expenses - - - - -

8980 0 0

To laying out, surveying, and levelling, be-



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	£	s.	d.
tween Bramholt Tunnel, on the Leeds and Thirsk Railway, passing by Otley towards Bolton, according to the original intention of the committee, ten miles at £55 - - - - -	550	0	0
To surveying, levelling, and laying out an alteration in the line near Bolton, to avoid the opposition of the Duke of Devonshire, four miles, at £55 - - - - -	220	0	0
To surveying, levelling, and laying out a deviation of the line between Kettlewell and Thwaites Bridge, in order to adopt the atmospheric principle, by order of the board, sixteen miles, at £55 - - - - -	880	0	0
To ditto ditto, another deviation to avoid the second tunnel at Bambridge, including all the necessary documents fit for deposit, furnishing solicitors and engravers with plans, &c., completed in the same manner as the main line, six miles, at £105 -	630	0	0
To Mr. Arrowsmith the engraver's bill -	1,345	0	0
	12,855	0	0
By cash on account, at various times -	6,000	0	0
	£6,855	0	0

“ Interest on £6855, from the 10th day of January, 1845, at £5 per cent. per annum, until payment.

“ Above are the particulars of the plaintiffs' demand in this action, and for the recovery whereof the plaintiffs will avail themselves of the whole or any part of the declaration. Dated this 7th day of January, 1846.”

A summons was afterwards taken out by the defendants for further and better particulars, which was heard before

*Alderson*, B., at chambers, when his lordship directed that the plaintiffs should furnish further particulars of the sums of money alleged to have been paid by them to the defendants' use, but refused the general order applied for. Further particulars of the payments were accordingly furnished; but, the defendants being dissatisfied with the limited nature of the order,

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*Montague Smith* now moved for a rule calling upon the plaintiffs to shew cause why they should not furnish further and better particulars of their demand.—These particulars are not a sufficient compliance with the rule of court. The case of a surveyor or engineer employed by a railway company cannot differ, in this respect, from that of any ordinary person who expends his labour and money for another. [*Alderson*, B.—The particulars of a man's claim must necessarily vary, according to the mode in which he deals, and the manner of keeping the accounts in the particular business he is engaged in. You cannot expect a surveyor to tell you the number and extent of all the fields he has measured, or the exact number of times he has set up his theodolite. The object of particulars is to control the generality of the declaration; and surely these particulars sufficiently shew you of what the plaintiffs' claim consists.] The second item charges one gross sum of nearly £9000 for surveying, travelling charges, and other expenses, without stating either the time occupied by, or the number of persons employed upon the work, or shewing how much of the charge is for the plaintiffs' own skill, labour, and time, and how much of it for those of their assistants: nay, the monies paid out of pocket are not even distinguished. The object of the bill of particulars is to give the defendants information of what the plaintiffs intend to go for at the trial, so that they may ascertain whether there is any part of the demand in respect of which they ought to pay money into court. The purpose of the present application is to obtain

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such information as may enable the defendants to decide whether they shall propose a reference of the cause to arbitration. [*Alderson*, B.—You cannot want such minute particulars for that purpose. If you are not satisfied with the plaintiffs' charges, you can get another engineer to go over the line, and tender or pay into court what sum he considers reasonable.] That would merely be to incur the expense of two engineers instead of one. [*Pollock*, C. B.—If the particulars were for making a survey, so many miles, at so much per mile, would that do?] No; the plaintiffs ought to distinguish between their own time and expenses, and the time and expenses of others. Their own personal charges as the *engineers* of the railway ought to be separated from all other charges. [He then read a letter from the plaintiffs' attorneys to the defendants' attorneys, dated 14th January, 1846, as shewing that the plaintiffs had in their possession full accounts of the items of their charges, but declined to communicate them without an understanding that the defendants would pay the amount.]

*Sir John Bayley*, for the plaintiffs (who had been served with notice of the motion), appeared to shew cause in the first instance, but was not called upon.

*POLLOCK*, C. B.—This is an appeal against a discretionary order made by my Brother *Alderson* at chambers. I think the discretion exercised by him was quite right, and that no rule ought to be granted. The true distinction is between the *explanation* of a charge and the charge itself. If the matters stated in this bill of particulars were in themselves the distinct subject of a charge, for example, such as stationery, travelling expenses, &c., then there ought to be some further particulars of them; but that is not so, for the matters inserted here are only the explanation of a charge already made. In refusing this application, we do not propose to lay down, in the case of an engineer,

any rule different from those which are usually acted on in similar cases,—in the case, for instance, of a builder, or of a coachmaker. If a coachmaker charge £300 for building a carriage, he need not shew, in his particulars of demand, the different items of which that charge consists, by specifying so much for the wheels, so much for painting, and so much for a certain number of men employed. So, in the case of a surveyor, if he gives such information as will enable the defendant to see what sum, if any, he ought to pay into court, and for what amount, if any, he ought to defend the action, we will not compel him to detail the various items of which his charge is made up. Mr. *Smith* says, he should not be satisfied with a particular which stated how much per mile was charged for the survey; but it seems to me that such a particular would be perfectly satisfactory, for then the only question for the jury would be, whether the charge so made was a reasonable one. Now, these particulars state the terminus *a quo* and the terminus *ad quem*, so that the number of miles charged for is at once ascertained; and any engineer, by taking the distance, and looking at the map, would be able to say whether the charge was reasonable or not. If the learned Judge's order for further particulars of the sums paid has not been sufficiently complied with, the proper course is to go before him again, and represent to him wherein it has not been duly obeyed.

ALDERSON, B.—The rule is, that a defendant is entitled to such particulars of the plaintiff's demand as will give him that information which a reasonable man would require respecting the matters against which he has to defend himself; and the question is, whether these particulars do not give every reasonable information. The law requires the delivery of a bill of particulars, in order to control the generality of the declaration; but, in nine cases out of ten, particulars are really applied for at chambers with the view

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to entrap the plaintiff, by confining him within certain limits at *Nisi Prius*. We ought to take care that plaintiffs are not by these means limited too closely. In the present case, it would be most unreasonable not to allow the plaintiffs to tell in general terms what they are going for, and prove their demand by general evidence before the jury. No doubt, the defendants were entitled to know how much of the demand was for money paid.

ROLFE, B., concurred.

Rule refused.

Sir *John Bayley* applied for the plaintiffs' costs of appearing to shew cause.

*Montague Smith* cited *Fitch v. Green* (a), *Read v. Speer* (b), and *Begbie v. Grenville* (c), as authorities that a party who shews cause in the first instance, though he succeeds, is not entitled to costs.

PER CURIAM.—No doubt that is the general rule; but, in the cases cited, the rule, if granted, would not have operated as a stay of proceedings, and therefore the opposite party could not have been prejudiced by not appearing to shew cause in the first instance. Here the rule, if granted, would have occasioned delay, and would have prevented the plaintiffs from going to trial at the next sittings, and so far would have prejudiced them. We think, therefore, we must hold them entitled to the costs of coming here, which will be plaintiffs' costs in the cause.

(a) 2 Dowl. P. C. 439.

(b) 5 Dowl. P. C. 330.

(c) 3 Dowl. P. C. 502.

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## HART v. MILLS.

Jan. 28.

**D**EBT for goods sold and delivered, and on an account stated. Plea, except as to the sum of 2*l.* 17*s.*, parcel &c., nunquam indebitatus; as to that sum, payment into court. At the trial, before the Secondary of London, it appeared that the action was brought to recover the sum of 17*l.* 14*s.*, on the following account:—

	£	s.	d.
“To four dozen old port, at 40 <i>s.</i> per dozen .	8	0	0
Four dozen pale sherry, at 40 <i>s.</i> per dozen .	8	0	0
Bottles, 28 <i>s.</i> ; hampers, 6 <i>s.</i> . . .	1	14	0
	<hr/>		
	£17	14	0”
	<hr/>		

It appeared in evidence that the defendant had ordered of the plaintiff two dozen of port and two dozen of sherry, with the understanding, that, if it were not approved by him, he should return it. On the following day, when it was delivered, the defendant accordingly, not being satisfied with its quality, returned the whole, except one bottle of the port and one dozen of the sherry, and sent with it the following letter to the plaintiff:—

“Gentlemen,—My order to Mr. John Simmons (the plaintiff’s traveller) was for *two* dozen of each, and not four: however, I should not have been particular about keeping the four dozen, if the quality had suited me. I beg leave to return you the four dozen of port, minus one bottle, which I tasted; as also three dozen of the sherry, as they neither suit my palate. I will call on you some day next week, and choose for myself the remainder of the order.”

The plaintiff’s witnesses stated that the wine was “good

The defendant ordered of the plaintiff *two* dozen of port and two dozen of sherry, with the understanding, that, if it were not approved, he should return it. The plaintiff sent him *four* dozen of port and four dozen of sherry. The defendant was not satisfied with its quality, and returned the whole, except one bottle of the port and one dozen of the sherry, with a letter to the plaintiff, in which he stated that his order was for two dozen of each kind of wine; that he should not have refused to keep the four dozen if the quality had suited him, but that, as it did not, he returned the four dozen of port, minus one bottle, which he had tasted, and three dozen of the sherry:—*Held*, that the defendant was liable only for the price of the wine he actually kept.

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sound wine." Upon these facts, the Secondary left the case to the jury, who found a verdict for the plaintiff, damages 1*l.* 3*s.* beyond the sum paid into court; and leave was reserved to the plaintiff to move to increase the damages by the sum of £4, his counsel contending that the defendant was liable for two dozen of each kind of wine.

*Burnie* having obtained a rule accordingly,

*Wordsworth* now shewed cause.—The defendant's order was for *two* dozen of each kind of wine, with the express understanding, that, if it was not such as he approved of, he might return it. That order was not complied with by the plaintiff, who supplied *four* dozen of each kind. The defendant was therefore at liberty to refuse the whole if he chose, and was bound to pay only for so much as he actually kept, viz. one dozen of the sherry and one bottle of the port, the price of which has been more than satisfied by the money paid into court, and the damages recovered. The jury appear to have acted on the ground that the defendant ought to have taken the rest of the sherry, of which he retained one dozen. The case of *Champion v. Short* (a) is an authority to shew, that, if a person orders several articles from a tradesman at the same time, although at distinct prices, he may consider the whole as forming one order, and is not bound to accept or pay for any particular article, unless the rest are furnished according to the contract. [He referred also to *Coleman v. Gibson* (b) and *Elliott v. Thomas* (c).]

*Burnie*, contra.—This was an entire contract, which was fulfilled by delivery, and the defendant could not repudiate it as to part. He does not absolutely reject it. [*Alderson*, B.

(a) 1 Campb. 53.

(b) 1 M. & Rob. 168.

(c) 3 M. & W. 178.

—How do you get over the difficulty, that you have not complied with *your* contract? The defendant orders two dozen of each wine, and you send four; then he had a right to send back all; he sends back part: what is it but a new contract as to the part he keeps? If you had sent only two dozen of each wine, you would be right; but what right have you to make him select any two dozen from the four? He affirms the contract as to the whole by the letter. [*Alderson*, B.—No; that is a new contract. The jury ought in truth to have found a verdict for the defendant, for the money paid into court covered the whole demand for which the defendant was liable. At present, you have been paid £4 for thirteen bottles of wine.]

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PER CURIAM (*a*),

Rule discharged.

(*a*) *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.



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Jan. 19.

BEVINS v. HULME.

A declaration in assumpsit stated, that the defendant was an attorney, and that, in consideration that the plaintiff would retain him as such attorney to conduct an action of tort at the suit of B. against L., the defendant promised to fulfil his duty as such attorney, in and about prosecuting the said action, and recovering damages; that the defendant did, under the said retainer, commence an action against L., in which judgment was recovered against him for £56; that the defendant afterwards, *as such attorney as aforesaid*, for obtaining satisfaction of the said damages, sued out a fi. fa. against L., to which the

sheriff returned that he had levied £9, part of the damages, and nulla bona as to the residue; that the defendant, *as such attorney as aforesaid*, for obtaining satisfaction of the said residue, issued a ca. sa., under which L. was imprisoned, and paid the residue of the damages to the gaoler, who paid the same to the defendant, as such attorney as aforesaid; and that, before he received the same, he sent, as such attorney as aforesaid, to the gaoler a discharge of L. out of custody, by virtue whereof he was discharged. Breach, that, although the defendant received the said damages, and the plaintiff paid to him, as such attorney as aforesaid, his costs of prosecuting the said action, he did not pay over to B. or the plaintiff the residue of the said damages.

*Held*, that this declaration was bad, on special demurrer, for not shewing distinctly that the money was received by the defendant, under his original retainer by the plaintiff in the action against L.

**ASSUMPSIT.**—The declaration stated, that, before and at the time of the making of the promise hereinafter mentioned, the defendant and one W. Andrew were in partnership as attornies, and thereupon heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant and his said partner W. Andrew, would retain and employ them, as such attornies as aforesaid, to prosecute and conduct a certain action by and at the suit of one John Bevins, the father of the now plaintiff, against one S. Lowe, to recover damages for injury sustained by the said John Bevins by reason of the said S. Lowe having before then negligently driven a certain gig upon, against, and over the said J. Bevins, for certain reasonable fees and reward to be therefor paid by the plaintiff to the defendant and his said partner, they the defendant and his said partner, then and long before the commencement of this suit, to wit, on &c., promised the plaintiff to observe, perform, and fulfil their duty as such attornies in and about prosecuting the said action for the plaintiff, and in and about recovering damages for the said injury, and in relation thereto, and to do their duty as such attornies as aforesaid in and about the premises; that, in pursuance and part performance of the said promises, the defendant and his partner did, under the said retainer of the now plaintiff, afterwards, to wit, on &c., commence an action on the case

against the said S. Lowe at the suit of the said J. Bevins, in her Majesty's Court of Common Pleas at Westminster, to recover damages for the said injury so sustained by the said J. Bevins as aforesaid; and such proceedings were thereupon had and taken by the said defendant and his said partner, under the said retainer of the now plaintiff in the said action, that afterwards, to wit, on the 19th May, A. D. 1841, by the consideration and judgment of the said Court, the said J. Bevins recovered against the said S. Lowe 56*l.* 15*s.*, which were adjudged to the said J. Bevins in and by the said Court for his damages by him sustained, as well on occasion of the said grievance so complained of by him as aforesaid, as for his costs and damages by the said J. Bevins about his suit in that behalf expended, whereof the said S. Lowe was convicted, &c. And the plaintiff further says, that afterwards, to wit, on &c., the defendant and his said partner, as such attornies as aforesaid, for obtaining satisfaction of the said damages so recovered as aforesaid by the said J. Bevins, sued and prosecuted out of the said court of our said lady the Queen at Westminster as aforesaid, a certain writ, called a writ of fieri facias, directed to the chancellor of the county palatine of Lancaster, whereby our said lady the Queen commanded the said chancellor, that, by her Majesty's writ under the seal of the said county palatine to be duly made, and to be directed to the sheriff of the same county, the said chancellor should command the said sheriff, that, of the goods and chattels of the said S. Lowe in his the said sheriff's bailiwick, he should cause to be made the said sum so recovered by the said J. Bevins as aforesaid, for his damages aforesaid, to wit, 56*l.* 15*s.*, together with the interest on the said last-mentioned sum, at the rate of £4 per cent. per annum from a certain day, to wit, on &c.; by virtue of and in obedience to which said writ the said chancellor did afterwards, to wit, on &c., by her Majesty's writ, under the seal of the said county palatine, duly made and directed to the sheriff of the said county

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of Lancaster, command the said sheriff to do all things as by the said writ so directed to the said chancellor as aforesaid, he was commanded to command the said sheriff; to which said writ of fieri facias, so directed as aforesaid, he the said sheriff afterwards, to wit, on &c., returned to the justices of the said court of our said lady the Queen at Westminster, that, by virtue of the said writ, he the said sheriff had caused to be made of the goods and chattels of the said S. Lowe within his the said sheriff's bailiwick a certain sum, to wit, 9*l.* 4*s.* 2½*d.*, part of the said damages so recovered as aforesaid, and that the said S. Lowe had not any more goods or chattels in his the said sheriff's bailiwick whereof he could levy the residue of the said damages, or any part thereof. That thereupon afterwards, and before the commencement of this suit, to wit, on &c., the defendant and the said W. Andrew, as such attornies as aforesaid, for obtaining satisfaction of the said residue of the said damages so recovered as aforesaid, sued and prosecuted out of the said court of our said lady the Queen at Westminster aforesaid a certain other writ of our said lady the Queen, called a *capias ad satisfaciendum*, directed to the chancellor of the said county palatine of Lancaster, whereby our said lady the Queen commanded the said chancellor, that, by the writ of our said lady the Queen, under the seal of the said county palatine to be duly made, and to be directed to the sheriff of the said county, the said chancellor should command the said sheriff to take the said S. Lowe, if he should be found in his the said sheriff's bailiwick, and keep him safely, so that the said chancellor might have the said S. Lowe's body before the said justices at Westminster immediately after the execution of the said last-mentioned writ, to satisfy the said J. Bevins for the residue of the said damages and interest aforesaid, to wit, 47*l.* 10*s.* 9½*d.*; by virtue of and in obedience to which said last-mentioned writ, the said chancellor afterwards, to wit, on &c., by her Majesty's writ, under the seal of the said

county palatine, duly made and directed to the sheriff of the said county of Lancaster, did command the said sheriff to take the said S. Lowe, and do all things as by the said writ, so directed to him as aforesaid, the said chancellor was commanded to command the said sheriff; and the said writ was, afterwards, and before the delivery thereof to the said sheriff, duly indorsed with an indorsement, directing the said sheriff to take the said S. Lowe to satisfy the said damages, to wit, 47*l.* 10*s.* 9½*d.*, and a certain sum, to wit, 3*l.* 10*s.*, for the costs of the said writ, besides sheriff's poundage and lawful expenses; and the said writ was afterwards, and before the commencement of this suit, to wit, on &c., delivered by the defendant and his said partner to the said sheriff, so indorsed as aforesaid, to be executed in due form of law; and the said sheriff afterwards, to wit, on &c., in obedience to and by virtue of the said writ, took and arrested the said S. Lowe by his body, and detained and had him in his custody, under the said writ, for the said residue of the said damages and interest aforesaid; and afterwards, to wit, on &c., the said S. Lowe was, under and by virtue of the said writ, imprisoned and detained in prison in a certain gaol, to wit, Lancaster Castle; that the said S. Lowe, so being in custody, afterwards, to wit, on &c., paid the remainder of the said residue of the said damages and interest for which he was so detained in custody as aforesaid, to wit, 57*l.* 0*s.* 9½*d.*, to the governor of the said gaol, to wit, one James Hanbrow, who afterwards, and long before the commencement of this suit, to wit, on &c., paid the same to the defendant and the said W. Andrew, *as such attornies as aforesaid*, and the defendant and the said W. Andrew, as such attornies as aforesaid, then, and before the commencement of this suit, to wit, on &c., had, took, accepted, and received the same; that the defendant and the said W. Andrew, before they so accepted and received the said residue of the said damages, interest, costs, and expenses, to wit, 57*l.* 0*s.* 9½*d.*, wrote and sent, as such attornies as aforesaid,

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to the gaoler in whose custody the said S. Lowe then was, to wit, the governor of the said gaol, a discharge of the said S. Lowe out of the said custody; by virtue of which said discharge the said S. Lowe was afterwards, and before the payment of the residue of the said damages, interest, costs, and charges to the defendant and the said W. Andrew, as such attornies as aforesaid, and long before the commencement of this suit, to wit, on &c., released and discharged from the said custody. Nevertheless the plaintiff saith, that, although the defendant and the said W. Andrew, as such attornies as aforesaid, so had, took, accepted, and received the said residue of the said damages, interest, costs, and charges as aforesaid; and although the now plaintiff, before they had, took, accepted, and received the same as aforesaid, to wit, on &c., duly paid them the defendant and the said W. Andrew, as such attornies as aforesaid, their costs and charges of prosecuting the said action against the said S. Lowe, amounting to a large sum, to wit, the sum of 32*l.* 9*s.* 5*d.*, yet the defendant and the said W. Andrew have not, nor has either of them, paid to the plaintiff, or to the said J. Bevins, or to any other person, the said sum so accepted and received by them as aforesaid, as and for the said residue of the said damages and interest, costs and charges as aforesaid; nor have the defendant and the said W. Andrew, or either of them, accounted to or with the plaintiff, or the said J. Bevins, or any other person, for the said last-mentioned money, or any part thereof.

Special demurrer, assigning for causes, (amongst others), that the declaration did not shew any breach of promise, inasmuch as the retainer of the defendant and his partner terminated with the judgment; and that it did not appear that the plaintiff had any authority from J. Bevins, or was entitled to recover the said damages and costs. Joinder in demurrer.

The case was argued in last Michaelmas Term (November 10) by

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*Crompton*, in support of the demurrer.—This declaration is bad. The breach of duty alleged in it is not within the terms of the promise alleged. The retainer of the defendant is to prosecute an action to recover damages for an injury done to the plaintiff, and was at an end before the breach of duty complained of, viz. the not paying over to the plaintiff the damages recovered in the action. The declaration itself shews, that the defendant did prosecute the suit to judgment and execution; that damages were recovered; and that the defendant in that action was taken in execution on a ca. sa., at the plaintiff's suit. Besides, the retainer could only exist for a year and a day after the judgment, within which period only an attorney has power to sue out execution: *Tidd's Prac.* 93, (9th edit.); *Savory v. Chapman* (a). The declaration should therefore have shewn that the execution was issued within the time limited by law. In *Tippling v. Johnson* (b), where an application made was to set aside a judgment, on the ground of its being sued out by a different attorney from the one who had been the original attorney in the cause, *Heath, J.*, said, that "it appeared, by several cases collected in *Rolle's Abr.* (c), that the authority of an attorney determines with the judgment, and therefore no order to change the attorney was necessary." A promise, therefore, by the attorney to his client, in relation to judgment in the action, does not necessarily apply to the execution, or the proceeds of it. The substantial duty alleged in this declaration is to recover the damages, and that has been performed.

Secondly, the declaration does not shew that the plaintiff had any authority from J. Bevins to receive the money; and therefore, if the defendant had paid it over to the plaintiff, he would have remained liable to Bevins. The plaintiff cannot maintain the action, unless he shews that he

(a) 11 Ad. &amp; E. 829; 3 P. &amp; D. 604.

(b) 2 Bos. &amp; P. 257.

(c) 1 Roll. Abr. 201.

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had some interest in the money. [On this point, he cited *Robson v. Eaton* (a) and *Stanley v. Jones* (b).]

*Prideaux*, contra.—A retainer to an attorney to prosecute a suit authorises him to conduct it to final judgment, and to levy execution: *Brackenbury v. Pell* (c); and an execution levied on a judgment above a year old is not void, but voidable only: *Blanchenay v. Burt* (d). [Parke, B.—This declaration does not shew distinctly that the defendant sued out the process on the original retainer: the words “as such attorney” are ambiguous, and may mean an attorney either under the former retainer or under a new retainer.] The attorney in the cause is the party entitled to receive the fruits of the execution: *Crozier v. Pilling* (e). The declaration alleges, “that the plaintiff paid to the defendant and Andrew, as such attornies as aforesaid, their costs of prosecuting the action against Lowe:” that must mean costs which accrued upon the retainer before mentioned. The Court will not presume against the plaintiff, that there was any new retainer. [Parke, B.—*Lawrence v. Harrison* (f) appears to be an authority in your favour. There *Holt*, C. J., says, “The only question is, whether the warrant of attorney be determined by the judgment given in the suit wherein he was retained; and I conceive that it is not, for the suit is not determined; for the attorney, after the judgment, may be called upon to say why there should not execution be made out against his client, and he is trusted to defend his client as far as he can from the execution.”] *Tipping v. Johnson* decides no more than that the plaintiff, after final judgment, may change his attorney without an order of the Court: and *Savory v. Chapman* is an authority only that the plaintiff’s attorney has no power to authorise the discharge of the defendant out of the custody of the marshal on pay-

(a) 1 T. R. 62.

(b) 7 Bing. 569.

(c) 12 East, 588.

(d) 4 Q. B. 707; 3 G. &amp; D. 613.

(e) 4 B. &amp; Cr. 26; 6 D. &amp; R. 129.

(f) Styles, 426.

ment of the debt, so as to excuse an escape, without an express authority from the plaintiff being shewn.

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*Crompton* was heard in reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

**PARKE, B.**—This case was argued before my Lord Chief Baron, my Brothers *Alderson* and *Platt*, and myself, in the course of the last Term.

The question is, whether the declaration is bad, for any of the causes assigned in the special demurrer.

The action is on a special contract between the defendant and one Andrew, who are stated to be in partnership as attornies, and the plaintiff; and it is averred, that, in consideration, &c., [His Lordship here read the declaration.] To this declaration there is a demurrer, assigning several causes; but the material one is, that it is not alleged that the defendant and Andrew, in receiving the money, acted on the retainer of the plaintiff. Though the declaration would, we think, have been good after pleading over, or on general demurrer, it seems to us that it is bad for the cause assigned. The contract declared upon is that made in consideration of the original retainer, by the plaintiff, of the defendant and Andrew to prosecute a suit in the name of another person, for reward to be paid by the plaintiff; and the defendant and Andrew's promise is to perform and fulfil their duty as attornies, in prosecuting the action for the plaintiff, and in and about recovering damages, and in relation thereto: and the breach meant to be assigned is, the non-payment of the damages after the receipt thereof. Now, what was the duty, in this respect, of the defendant and Andrew, as attornies in that suit, arising out of the original retainer by the plaintiff? It was, that, if they received the damages as attornies in that suit under that retainer, they would pay



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them over, whether to the plaintiff in the present suit, or the nominal plaintiff in that which they brought, does not appear, but to one or the other: it certainly, however, was not a duty flowing out of the original retainer, to pay any money received at any time by them, though as attornies. Is there, then, a sufficiently certain allegation, that the money which they refused to pay over to the present plaintiff or the nominal plaintiff was money which was received by them as attornies in *that action under that retainer*? It appears to us that there was not; for, though we agree that the original retainer is to be presumed, *primâ facie*, to continue as long as by law it might, as argued by Mr. *Prideaux* on the authority of Lord *Ellenborough's* dictum in *Brackenbury v. Pell* (a), and although we think he was right in contending that the original retainer was not determined by the judgment, but continued afterwards, so as to warrant the attorney in issuing execution within a year and a day, or afterwards, in continuation of a former writ of execution issued within that time, and also to warrant his receiving the damages without a writ of execution, the weight of prior authorities (b) being against the decision of *Heath, J.*, in *Tipping v. Johnson* (c), yet it seems to us that the averment of the receipt of the money is bad for uncertainty. It is stated, that the defendant in the original action, being in custody on a *ca. sa.*, paid a sum, being the amount of the residue of the damages, not to the sheriff, but to the governor of the gaol, who paid it to the defendant and Mr. Andrew, "as such attornies as aforesaid." This expression is ambiguous: it may mean as attornies for the plaintiff in that suit, and under the original retainer, or it may mean (as the same expression certainly does, in the allegation of the special contract itself) simply as attornies, or attornies in co-partnership. In the latter case, the averment would be clearly

(a) 12 East, 588.

(b) Styles, 426, *Lawrence v. Harrison*; Roll. Abr., "Attorney," (M.), 4, 5; 2 Inst. 378; *Lamb v. Williams*, 1 Salk. 80.

(c) 2 Bos. & P. 257.

insufficient, and the non-payment to the plaintiff would be no breach of the contract declared upon; and the rule of construction is, that the words are to be taken most strongly against the party pleading. After pleading over, the allegation would be good, for then it would be understood in that sense which would require an answer; so also on general demurrer; but as the objection is pointed out on special demurrer, it seems to us that it ought to prevail.

Judgment for the defendant.

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THE *Attorney-General*, on the part of the Crown, moved to remove into the Office of Pleas of this Court the proceedings in a cause of *Hallett v. Vigne*, which had been commenced in the Court of Common Pleas. He did not move on affidavit, but applied for the order to remove the cause, as a matter of right, upon his own allegation, that the profit of the Crown came in question in it. According to the statement of the learned Attorney-General, the circumstances were as follows:—

The cause of *Hallett v. Vigne* was an ordinary action of trespass quare clausum fregit. The defendant (who was not an officer of the Crown) pleaded to the action, first, that the Chief Justice in Eyre had granted to him the defendant a license to hunt, shoot, &c. in the forest of Waltham, in the county of Essex; that the locus in quo was within the limits of the forest; that certain fences set up by the plaintiff interfered with the defendant's rights therein, and that he committed the alleged trespasses for the purpose of removing those fences, &c. The second was

An action of trespass qu. cl. freg. was brought in the Court of Common Pleas, to which the defendant pleaded pleas alleging that the locus in quo was within the limits of the forest of Waltham, that the Queen was seised in fee, in right of her Crown, of the forest, and justifying the trespasses as the servant and by command of the Queen. This Court (after a two days' notice to, and hearing counsel on behalf of, the plaintiff) ordered the cause to be removed

into the office of Pleas of the Exchequer, by a rule absolute in the first instance, on the allegation of the Attorney-General that the profit of the Crown came in question in the cause; the plaintiff being put in the same state of forwardness as he was in the Court of Common Pleas.

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a plea of liberum tenementum in her Majesty, and stated, that the defendant, as her Majesty's servant, and by her command, entered &c. and pulled down the fences: the replication to this plea traversed the title of her Majesty, and an issue was joined thereon. The fourth plea was, that the locus in quo was within the limits of the forest of Waltham; that her Majesty was seised in fee, in right of her Crown, of and in the said forest; and that, the locus in quo being wrongfully inclosed and fenced in, the defendant, as the servant of her Majesty, and by her command, entered and pulled down the fences, &c. To this plea the defendant replied, that the close in which &c. was not the close, soil, and freehold of our lady the Queen. There were also new assignments, and the defendant was under terms to plead issuably thereto, and to take short notice of trial for the next assizes for the county of Essex. In last Term, an information of intrusion was filed against the plaintiff in that action, Hallett, for an encroachment upon the royal forest of Waltham; and the trespass which was the subject of the action was one alleged to have been committed by the defendant Vigne in abating that encroachment.

A two days' notice of this motion having been given to the plaintiff Hallett,

*Montagu Chambers* and *Willes* appeared on his part to oppose the application.—'The prerogative of the Crown does not apply to this case, for this is not an action in which the title or profit of the Crown comes in question, so as to furnish any ground for the interposition of this Court. This is an ordinary action of trespass qu. cl. freg., between subject and subject, in no way relating to the Queen's revenue. Nor is it like the case of an ejectment against the Crown, in which, no doubt, the Court (supposing that its equity jurisdiction in matters of revenue still exists) would grant an injunction to stay the proceed-

ings. But the Court will not interfere with the right of the subject to sue in another court, unless there are precedents for such a course; and there is no precedent for removing into this court the proceedings in an action between subject and subject, merely because, on a collateral issue raised by the defendant, the title of the Crown is set up as a defence to the action. In order to sustain the application, the Attorney-General is bound to shew a general prerogative in the Crown to have the proceedings taken in this Court, whenever the title of the Crown to land incidentally comes in issue between subject and subject. It is submitted, further, that this Court has no peculiar jurisdiction in matters relating simply to the title of the Crown to *land*, though it is otherwise as to matters of revenue. But, at all events, the prerogative does not extend to such a case as this. It is an extraordinary doctrine, that when a party brings an action for breaking and entering a close of which he is possessed, and after he has proceeded, perhaps, up to the very point of trial, without the least intimation that the opposite party derives any right or authority from the Crown, he may be stopped by an allegation of some secret title in the Crown, and told that he ought to have sued in the Exchequer. [*Pollock*, C. B.—No, he may sue in any court he pleases; but as soon as the Crown in fact asserts its title, and interposes to make itself a party in the cause, the case assumes a new aspect, and the Crown has a right to say the cause shall be tried in this court.] The interests of the Crown may be equally protected, by the Attorney-General's demanding a trial at bar in the court in which the cause is depending. [*Platt*, B.—You contend, that, this being an ordinary action of trespass between subject and subject, the prerogative of the Crown does not apply: but there are authorities strongly against you upon that. There is the case of *Lamb v. Gunman* (a), which was an action of tres-

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pass, brought by the plaintiff in the Court of King's Bench, for taking a quantity of wine, alleged to be the property of the plaintiff. The defendant justified, as servant of the Duke of Cleveland, the taking of two tuns of wine, for duties of prisage, under a grant from King Charles II. to the duke's father; and that cause was removed into this court. Again, in Hardres's Reports, (p. 176), there is this case:—"Hammond was outlawed at the suit of another person, and lands in his possession were extended. A third person, that claimed a title to those lands, brought an action of ejectment for them, and pleaded to the inquisition; and an injunction was prayed for the King to stay proceedings at law, and it was denied; because, although a person outlawed cannot, after extent, prevent or avoid the king's title by any alienation, as appears by the 10 Hen. 7, yet the outlawry gives no such privilege to the possession of a disseisor, but that the disseisee may enter and bring his ejectment; for by the outlawry the king has a title only to the profits, and no interest in the land. But it was ordered, that the plea to the inquisition should be tried first, and that the ejectment should be brought in this Court, because the king's revenue was concerned." Those cases are distinguishable from the present. The latter was a case where there had been process on a judgment of outlawry; there was a writ of *capias utlagatum*, and an inquisition thereon, which was traversed by a person who claimed title to the lands which by the inquisition were found to be the lands of the outlaw. That traverse was the proper mode of trying whether the hand of the Crown should or should not be removed from the lands; so that the result of that traverse, and equally so of the ejectment, directly affected the interest of the Crown. [*Platt, B.*—By the pleadings in this case, there is a direct question of the Crown's title: is not that enough?] The finding of the issue one way or other will not affect the interest of the Crown; it will be binding only as between the parties, and will be no estoppel as against

the Crown, so as to affect its title. In truth, the real question on these pleadings is, not whether the locus in quo is part of the soil and freehold of her Majesty, but simply whether the limits of the forest extend over the land on which these fences were made. There is no question raised as to the title to the soil and freehold of the forest; and the defendant is a mere licensee under a forest license, and not the officer and servant of the Crown. [*Alderson*, B.—The issue on the fourth plea brings directly in question the title of the Crown; and if there be any one issue upon which the Crown may interfere at the trial of the cause, that is enough to warrant the application to have the cause tried in this court.] But the question raised by the plea is not one which will be disputed by the Crown; because it is not pretended that the Crown claims the plaintiff's land, but only claims that it is within the regards of the forest, which is a question not at all raised by the plea. On this ground, therefore, the profit of the Crown does not appear to come in question in the action, and so the prerogative of the Crown does not apply. In *Caiothorne v. Campbell* (a), which is the leading case on this subject, *Eyre*, C. B., states the prerogative as applying "where the matter of suit in another Court touches the profit of the king;" and says that then, on the prayer of the Attorney-General, the action is to be removed. And he then refers in the following terms to the case of *Lamb v. Gunman*:—"That was an action between the Duke of Cleveland's bailiff and some other persons of the town of Rye, upon a demand of prisage of wine; and there was an issue joined upon this question, whether the town of Rye was entitled to be exempted from this claim of prisage. The king had a reversionary interest in the prisage, because it was granted to the Duke of Cleveland in tail; and in respect of this interest, it was held that the king had a right to desire that that cause might be removed into the Court of

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(a) 1 Anstr. 205, n.

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Exchequer; and the cause was accordingly removed."

[*Parke, B.*—I am quite at a loss to see how you distinguish that case from the present: it seems to me to be exactly in point.] That was an action brought against a revenue officer, and the question in it related directly to a branch of the king's revenue. [*Parke, B.*—Surely, whether particular land is within the regards of the forest of Waltham, touches the Queen's profit. Whether the right of the Queen extends over the locus in quo, is within the issue in this cause; and surely it is of great importance, as regards the revenue, whether the forest extends over one acre or five thousand; of just as much as the question in the case of *Lamb v. Gunman*, namely, whether the right to the prisage of wine, which existed over the kingdom generally, extended to the port of Rye. I do not see how you can draw any distinction between that case and the present.] The distinction is, that that was a question relating to the duties of revenue, and not to the title to land. [*Alderson, B.*—Lord *Coke*, in the 4th Inst., c. 11, p. 112, speaking of the profit of the king, says—"This profit is either immediate or mediate; immediate, as of lands, rents, franchises, hereditaments, debts, duties, accounts, goods, chattels, and other profits and benefits whatsoever due to the king; mediate, as, first, the privilege of the officers and ministers of the Court; for two things do principally support the jurisdiction of a Court, namely, the just preservation of the dignity of it, and the due attendance of the officers and ministers of the same, to sue and be sued in this Court." The only difference, therefore, between the privilege of the officer and the profit of the king is, that the one is called the immediate and the other the mediate jurisdiction.] The defendant in this case is no officer of the Crown. [*Alderson, B.*—The rule which is laid down is, that all questions touching the profit of the Crown are to be tried in this Court. Here the question is raised, whether the locus in quo is within the limits of the forest of Waltham. Can it be doubted that that is a matter

touching the profit of the Crown? Where an action is brought, in which the conduct of an officer of the Crown is brought into question, the matter, though in dispute in another Court, is brought here, *because* it is a matter which, mediately, touches the profit of the Crown, as regarding the due sustentation and support of its officers. The cases of officers, according to Lord *Coke*, are in truth cases touching the profit of the king; and it really seems impossible to distinguish those cases from the present.] In *Bac. Abr., Prerogative*, (E. 7), where the cases are collected, it is said—“Where the king’s revenue is concerned in the event of a cause, it shall be removed from any other Court where the action is brought, into the Office of Pleas of the Exchequer;” and the case of *Lamb v. Gunman* is then set forth, in the terms already referred to. And it will be found that all the cases there stated were actions referring directly to the ordinary revenue of the Crown, in the shape of monies, duties, or customs; but there is nothing to shew that the prerogative applies to cases in which the title of the Crown to land comes in question upon a mere collateral issue between subject and subject.

But secondly, there should at all events have been a rule to shew cause. *The Attorney-General v. Kingston* (a) is a precedent for such a course. It will be said that here the plaintiff has had notice of the application; but it is not such a notice as would enable him to come properly prepared to resist it; it ought at least to have been a four days’ notice, according to the practice. The object of the notice is, that the party may be heard upon it, which ought to be upon a reasonable notice. [*Pollock*, C. B.—You are no doubt entitled to be heard; the only question is, whether the notice is to be a two days’ or a four days’ notice. Upon looking into my Brother *Manning’s* book (b), I find that four days’ notice was usually given; but the authority there referred to is an anonymous case in *Anstruther*, where all

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(a) 8 M. & W. 163.

(b) Mann. Exch. Pr. 190.



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that is said is "upon notice," not mentioning any time. The Queen's Remembrancer, however, certifies to us that the practice is two days' notice—one clear day; and that notice you have had.]

If, then, the Court determines to interpose to remove the action in this case, the question will be on what terms. According to the case in *Anstruther*, the rule should call on the defendant to appear to accept a declaration, and to put the plaintiff in the same state of forwardness in this as he was in the other Court. The plaintiff will be obliged to give up his proceeding in the Common Pleas, and must sue out a fresh writ of summons in this Court, in order to commence the action in conformity with the requirements of the stat. 1 & 2 Vict. c. 110; and then he must deliver his declaration, and have the pleas delivered to him, and the replication and new assignments must be delivered to the defendant. The rule, therefore, ought to be in more special terms than before the statute of Victoria, when the practice was more loose. [The *Attorney-General* suggested, that no terms ought to be engrafted on the rule; but that, if the Court would state the practice, it would be pursued. *Pollock*, C. B.—The plaintiff ought certainly to be placed in the same state of forwardness. There must be a writ, otherwise no writ of error will lie. *Parke*, B.—The plaintiff must commence de novo, and by the statute he can only commence by writ, to which the defendant must appear, and the same pleadings are to be considered as the pleadings consequent upon that writ.]

The *Attorney-General*, the *Solicitor-General*, *Jervis*, and *W. F. Pollock*, appeared for the Crown, but were not called upon to argue.

*POLLOCK*, C. B.—There is no doubt whatever in the mind of the Court, that in this case the rule must be made absolute as prayed. There has been some misapprehension, during the discussion, as to the nature of this proceeding.

It is an application on the part of the Crown, to remove into this Court an action commenced in the Common Pleas. Now it appears to have been the practice of the Court, (a practice from which we shall not depart, either now or on any other occasion), that such an application should be made on notice to the other party; but the proceeding in this Court is not by a rule to shew cause; it is an application for a rule absolute in the first instance, only giving notice to the other side, in order that they may come in and be heard. Accordingly, the Court have heard, at considerable length (I do not say at a greater length than the importance of the case required), every thing that could be urged to induce the Court to refuse this rule. It is said, that this is an application which the Court ought not to entertain at all: and Mr. *Willes* also contended, for some time, that the defendant was entitled to be heard. Now, if by that it was meant that there ought to be a rule to shew cause, and that he should be heard, in the ordinary way, by affidavits, and by shewing cause, I think Mr. *Willes* was not well founded in that proposition: but if his meaning was, that the party ought to be heard, inasmuch as notice had been given with the view to his being heard, then I think he was perfectly right; and this being an application in a case in which the Crown does not appear to be interested as a party to the record, but where the Crown interposes to take up the case of the defendant, the defendant is really brought here on the part of the Crown, and is in Court for the purpose of obeying the directions of the Court. With respect to the substance and the merits of the case, I cannot distinguish this case in any way from those which have been referred to during the argument. If an act has been done by any person on behalf of the Crown, and that is made the subject of an action of trespass, it is a matter of course that the action should be moved into this Court, at the instance of the Crown, by rule absolute in the first instance. Then the parties may be heard, no doubt, in the

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same way that a party may be heard to shew cause against a rule for an attachment, when the contempt is perfectly clear; but I apprehend, that, where an action of trespass is brought against a Queen's officer, and it is proposed, on the part of the law-officers of the Crown, to remove it into this Court, their right to do so is now so well established, that I should little expect such an application to be resisted. It is, in truth, a proceeding as little disputable as any ordinary motion which is founded on the well-known, established, and daily occurring practice of the Court. It is said, however, that this is an action between subject and subject, respecting a matter which relates to land, and not to a mere question of revenue; but I think that is at once answered by the practice. The action of ejectment is *prima facie* an action merely between subject and subject, and relates to land, yet the prerogative of the Crown applies to that; and if the interest of the Crown is concerned, an action of ejectment may be removed into this Court. It may be said, however, that that does not amount to an authority, because the action does not go on; the reason of that is, that, in this Court, an action of ejectment will not lie against the Crown. The party must proceed by a petition of right. In an action of ejectment, we remove it, although we thereby actually extinguish the action; and therefore that is rather an *a fortiori* argument for removing this cause, which is sought to be removed for the express purpose of going on with it. But I refer to that only as an authority for saying that the prerogative of the Crown applies not only to matters of revenue, ordinarily so called, but also to a case where land is the matter in dispute. Then it is said that this action does not relate to the profits of the Crown,—that it does not touch the profits of the Crown. Mr. *Willes* took a very subtle distinction, founded upon the pleadings, viz., that the title of the Crown is admitted to the forest, but the dispute is whether this is part of the forest or not. If the contention be whether the forest actually includes within its bounds

a certain tract of country, it matters not whether it is one acre or five hundred—surely no one can say that the profit of the Crown is not touched, when we have an inquiry arising out of the pleadings, admitting the title of the Crown to the forest, but denying that the right of the Crown exists over the locus in quo, because it is not part of the forest where the right does exist; and, as has been suggested by my Brother *Parke*, if this is a question of boundary, the Crown is materially interested, although this is a suit between party and party; for this might become evidence hereafter against the Crown, as to what are the bounds of the forest in question, this being a right of a public nature. The general practice of the Court, then, being well established in cases of revenue, where the interest of the Crown is concerned, and being also well established in cases of land, by the course pursued in the case of an action of ejectment, what is there to prevent the application of the same rule to the present case? Does this case touch the profit of the Crown? It seems to me that it does. Does the title of the Crown come in question? Why, it comes immediately in question, as in the case referred to by my Brother *Parke*, and which appears to me to be directly in point. Then it is said we ought to impose certain terms. I think the Attorney-General is properly cautious in not permitting it (as far as he is able to prevent it) to be supposed that this rule is made absolute with any new terms. The rule is, however, to be made absolute with this understanding, that the plaintiff is to be placed, with reference to the proceedings in this Court, in a situation exactly the same in point of advancement as he was in the Common Pleas. The mode in which that is to be done, I own I should have thought would rather be a matter to be settled by the parties, or by the officer of the Court; but I think that, without any express direction of the Court, it carries with it a writ, if a writ be necessary;—it carries every thing that is necessary to put the plaintiff in a position as favourable, and as far

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advanced, and as safe as he was in the other Court. I believe I have now adverted to all the points that have been made; and it appears to me to be perfectly clear, that the Crown is entitled, in the ordinary way, to take from the jurisdiction of the Common Pleas the action that has been commenced there, and place it in this Court, in the same state of advancement as it was in the other Court. For these reasons, I am of opinion that the rule must be granted in the manner prayed by the Attorney-General.

PARKE, B.—I entirely agree with my Lord Chief Baron; and he has gone so fully into the case, that I think it quite unnecessary to add anything to what has fallen from him.

ALDERSON, B.—I am quite of the same opinion. This is a matter that clearly touches the profit of the Crown; and really the whole arises out of this, that in ancient times it was, for the convenience of all parties, agreed that the Court of Queen's Bench should have certain peculiar jurisdictions, the Common Pleas certain other peculiar jurisdictions, and the Court of Exchequer certain others. Among the last, belonging to the Court of Exchequer, was assigned the jurisdiction in all those cases which touched the profit of the king; and in order to bring them here, this process must be adopted. It is not in truth any claim of prerogative adverse to the subject, because it belongs to the Crown. You cannot indict a person in the Exchequer or in the Common Pleas, nor can you bring a *quare impedit* in the Court of Queen's Bench, or in the Exchequer, unless the king himself be personally concerned: but the subject is as well off in the one Court as in the other.

PLATT, B.—It appears to me to be clear from the pleadings in this case, that the motion of the Attorney-General ought to be successful. We find upon the pleadings, on the

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fourth plea, a direct assertion on the part of the defendant of the right of the Crown, and a justification by him, under that right, of the acts which he is called upon to answer. To that it is replied, that the Queen has not the soil or freehold; does that raise no question of right in the Crown? Surely it raises a question of right, in the first place, whether the locus in quo is a parcel of the forest, and secondly, whether the Queen has the fee of that parcel of the forest. It seems to me that it plainly raises a question of the right of the Crown; and it is idle to talk of that not coming within the word "profit;" for what is the use of lands, except by reason of the profit which is derived from them? If the land be taken away, indirectly the profits of the Crown are taken away. It is a matter relating to the revenue of the Crown, for the profit of the Crown is undoubtedly in question. It has been said, that in cases of ejectment the Crown has not been allowed to carry on the proceedings in this Court. Is there not a very plain answer to that, viz. that it is the prerogative of the Crown not to be sued by writ? and it would be one of the most absurd proceedings in the world for the Crown to command itself. It is the prerogative of the Crown not to be sued by writ, and therefore another proceeding is adopted, called a petition of right, upon which, if it is successful, the direction of the Crown is "that right shall be done." *Hammond's case* appears to me directly in point. There an outlawry had taken place, and an inquisition issued; the party under that inquisition held the land, and the party disseised brought ejectment, and also traversed the inquisition, which he had the right to do, and then, upon application to this Court, that proceeding was allowed to go on, and the ejectment, which was inter partes, between the disseisee and disseisor, was directed to be removed into this Court; shewing that the cases alluded to in the note in *Anstruther* are not applicable only to the case where the tenant of the Queen is the party in possession. If the Queen herself is in possession, no subject can main-

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tain ejectment against her; the only mode of proceeding is by petition of right. If the subject is in possession, claiming a right under the Crown, then the ejectment may be maintained; but, at the suggestion of the Attorney-General the proceeding would be brought into this Court.

Rule absolute.



Jan. 27, 28.

PETCH v. TUTIN.

The tenant for years of a farm, being indebted to his landlord, assigned to him, by deed, all his household goods, live stock, hay, and corn, as well in stock as then growing upon the farm, utensils and implements of husbandry, and also *all his tenant-right and interest yet to come and unexpired* in and to the farm and premises: to hold the said goods, cattle, chattels, tenant-right, effects, and things to the landlord, in trust to sell, and thereout to pay the debt, and to pay over the surplus to the tenant: and the tenant thereby granted to the landlord license and authority at any time to enter upon the farm, and take, carry away, and sell the goods, &c. thereby assigned:—*Held*, that under this assignment the tenant's interest in crops grown in future years of the term passed to the landlord.

**T**HIS was an action on the case, for rescuing out of the custody of the law certain growing crops, belonging to one Samuel Pape, which had been taken in execution under a *fi. fa.* issued upon a judgment recovered by the plaintiff against Pape. The defendant pleaded, that the said growing crops, in the declaration alleged to have been seized, were not the growing crops of the said Samuel Pape: on which issue was joined.

At the trial, before *Rolfe*, B., at the last assizes at York, the following facts appeared in evidence:—

In the month of July, 1843, a bill of sale was executed by the said Samuel Pape to the defendant, (who was his landlord of the farm therein mentioned), in the following terms:—“ This indenture, made the 8th day of July, A. D. 1843, between Samuel Pape, of Ellerbeck, in the county of York, farmer, of the one part, and John Tutin, of Northallerton, in the said county, mercer, of the other part: Whereas the said Samuel Pape is indebted to the said John Tutin in the sum of £640, secured to be paid to the

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said John Tutin or his order, on demand, with interest for the same after the rate of 5*l.* for £100 for a year, by the promissory note of the said Samuel Pape, bearing even date with these presents: And whereas the said S. Pape, being desirous to discharge the said sum of £640, so due and owing to the said John Tutin as aforesaid, hath proposed and agreed to make such an assignment to the said John Tutin as is hereinafter mentioned: Now this indenture witnesseth, that, for the considerations aforesaid, and also for and in consideration of the sum of 10*s.* of lawful British money by the said John Tutin to the said Samuel Pape in hand well and truly paid at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he the said Samuel Pape hath granted, bargained, sold, delivered, assigned, set over, and confirmed, and by these presents doth grant, bargain, sell, deliver, assign, set over, and confirm unto the said John Tutin, his executors, administrators, and assigns, all the household goods and furniture, beds, bedding, plate, linen, china, household utensils and implements of household, and all the horses, cows, heifers, sheep, pigs, and other cattle, and all the hay, corn, and grain, as well in stock and in the barn and granary as now standing, growing, and being upon the farm and premises of him the said Samuel Pape, situate in the township of Ellerbeck aforesaid, or elsewhere in the said county of York, and all the carts, wagons, gears, and husbandry and dairy utensils, goods and chattels of him the said S. Pape, in and about his dwelling-house and farm, situate and being at Ellerbeck aforesaid; and also all the *tenant-right and interest yet to come and unexpired* of him the said S. Pape, of, in, and to the said farm and premises: to have and to hold the said goods, cattle, chattels, tenant-right, effects and things hereinbefore mentioned, and intended to be hereby assigned unto the said John Tutin, his executors, administrators, or assigns, to the intent that he



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and they do and shall, as soon as conveniently may be, absolutely sell or dispose of the same, and every part thereof, either by public auction or private contract, and in such manner as he or they shall think expedient, and do and shall, by and out of the money arising by such sale, pay and satisfy the sum of 7l. 14s., the expenses of preparing these presents, and all the costs, damages, and expenses which he or they shall expend, or be subject or liable to, on account or in respect of the said sale, or otherwise relating to or concerning the execution of the trust in him and them reposed, and after paying, satisfying, and discharging such costs, damages, and expenses as aforesaid, do and shall in the first place retain and satisfy him the said John Tutin, his executors, administrators, and assigns the said sum of £640 so due and owing to him the said John Tutin from the said S. Pape as aforesaid, with the interest attending the same, and do and shall pay the ultimate residue or surplus of the said trust-monies (if any) unto the said S. Pape, his executors, administrators, and assigns. And the said S. Pape doth give and grant unto the said John Tutin, his executors and administrators, agents, servants, and assigns, full power, license, and authority, now or at any time hereafter, to enter into and upon the said dwelling-house, farm, and premises now in the occupation of him the said S. Pape, and to take, seize, sell, and carry away the said goods, cattle, chattels, effects, and things, hereby assigned, and for that purpose to break open any lock or bolt belonging to him the said S. Pape to come at the same, and to remove and carry away the said goods, chattels, effects, and things, or to continue the same there, until the same shall have been sold, at his or their will and pleasure. And the said S. Pape hath put the said John Tutin in possession of the same goods, cattle, chattels, effects, and things, by delivering unto him a key in the name and seisin of the whole at the time of the sealing and delivery of these presents. In witness, &c.

The principal question in the cause arose on the construction of this deed, viz., whether growing crops, not sown at the time of its execution, passed under it to the defendant. The learned Judge thought at the trial that they did not, and under his direction the plaintiff recovered a verdict for £100, the value of the growing crops seized; reserving leave to the defendant to move to enter the verdict for him, or to reduce the damages to a nominal sum.

In last Michaelmas Term, *Martin* obtained a rule nisi accordingly; against which

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*Watson* and *Hugh Hill* now shewed cause.—Upon a reasonable construction of the whole of this deed, the intention of the parties appears to have been to pass a limited interest only; and if so, the general words relied upon on the other side will not be construed so as to enlarge that limited interest. In *Ringer v. Cann* (a), Lord Abinger so states the rule:—"I think the distinction in all these cases is, whether the object of the parties was to pass a limited interest or not; if it was, then the rule is, that we are not to construe general words so as to enlarge that limited interest." If it had been the intention to pass the term, or future crops upon the land, surely more specific and stringent words would have been employed than the words "tenant-right and interest yet to come and unexpired." Look at the situation of these parties—tenant and landlord; the landlord cannot be supposed to have been taking an assignment of the whole term, and so destroying his right to distrain. And, if it were so, why is it that the landlord never took any possession of the land? [*Pollock*, C. B.—You say that the tenant assigned thereby everything that could be assigned, except the lease?] Yes; whatever was the subject-matter of valuation at that time, as between an incoming and outgoing tenant, *e. g.* the right to cut furze or underwood. The

(a) 3 M. & W. 347.

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object was merely to assign *existing things*, and thereby to pay off the debt. Accordingly, the trust for sale, and the license to enter for that purpose, are *immediate*: and such a license is altogether inconsistent with the supposition of the land itself having passed. The reasonable construction, therefore, of these words is, that they were meant to include all that was capable of being realised which was upon the land, *ejusdem generis* with growing crops.

Then, if the interest in the *land* does not pass, these words certainly would not pass a *future crop*; for, first, *no* words are sufficient to pass a subsequently acquired chattel: *Lunn v. Thornton* (a). It was expressly decided in that case, that a deed of bargain and sale could not pass the property in goods which did not belong to the grantor at the time of sale; at all events, unless there were some new act done by the grantor after he acquired the property, indicating his intention that it should pass. But, secondly, if future crops *can* pass by such a deed, these words are not sufficient to pass them. If the parties intended to pass the crops to be grown in future years, would they have specifically mentioned the crops *then* growing upon the farm? The rule of construction applies, that *expressio unius est exclusio alterius*,—the particular enumeration of certain things excludes the application of mere general words to other things of the same nature: *Hare v. Horton* (b), *Doe d. Meyrick v. Meyrick* (c), *North v. Bishop of Ely* (d), *Rawlins v. Jennings* (e), *Moseley v. Motteux* (f); per Alderson, B., in *Doe d. Spilsbury v. Burdett* (g). The parties having, in the previous part of the instrument, minutely specified all the different classes of household goods, farming implements, cattle, crops then housed and growing, could never have meant, by the vague and general words, “all the tenant-right and interest yet to

(a) 1 C. B. 379.

(b) 5 B. &amp; Adol. 715.

(c) 2 C. &amp; J. 223.

(d) Cited 1 Bulstr. 100.

(e) 13 Ves. 38.

(f) 10 M. &amp; W. 533.

(g) 9 Ad. &amp; E. 953; 1 P. &amp; D. 682.

come and unexpired," to convey crops to be sown and grown in future years. These words ought therefore to be understood as meaning merely the right which the tenant then had in the matters before mentioned.

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*Dundas* and *Addison* (with whom was *Martin*), in support of the rule.—The question is, what was the intention of the parties to this bill of sale, as it is to be collected from the terms of the deed itself. Clearly it was to assure to the landlord everything which the tenant had as tenant, both that which was then visible upon the land, and that which could be upon it afterwards during the term—everything in esse, everything in posse. The *visible* property is, as was natural, enumerated first, and the *potential* property afterwards. Otherwise, what sense is to be given to the words "yet to come and unexpired?" These words must have some meaning, and must have reference to something in futuro. It is said, however, that subsequently acquired chattels *could not* pass under the deed; but that is not so: the authorities shew, that, where there is a foundation for an interest in futuro, that interest may pass by such a deed. The case of *Grantham v. Hawley* (a) is decisive on this point. It was there held, that a party who has the interest in the land "may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant: as, (21 Hen. 6, A.) a parson may grant all the tithe wool he shall have in such a year, yet perhaps he shall have none." The principle of that decision is precisely applicable here. This party had the *potential* interest which the tenant of land has in a way-going crop, which becomes an interest in *actual* possession when the crop is grown. The cases cited on the other side are distinguishable. *Lunn v. Thornton* turned rather on the point of subsequent ratification than on the grant of future property; and that case recognises

(a) Hob. 132.

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and proceeds on the authority of *Grantham v. Hawley*. *Hare v. Horton* was a case depending altogether on the intention to be inferred from the words of the particular instrument. The same observation is applicable to the other cases. [*Pollock*, C. B.—Your distinction seems to be this: the party cannot grant the next year's wool of sheep he has not got, but he may grant the next year's wool of the sheep he has got.] Yes; it must be a grant of property of which he has either *actual* or *potential* possession, as stated in *Grantham v. Hawley*. It is said that the words of the habendum in this case, "goods, cattle, tenant-right, effects, and things hereinbefore mentioned," may all be referred to the visible property previously enumerated; but it is observable, that the words "effects and things" are not found in the previous enumeration. The words of the habendum, in truth, are meant to include everything before mentioned, whatever, according to the true interpretation of the instrument, that may be. [They referred also to *Shep. Touch.*, ch. 5, p. 76, and *Peacock v. Purvis* (a).]

POLLOCK, C. B.—I think the rule ought to be absolute. It is only necessary to examine this instrument throughout, to see that the future crops must fall within the meaning of the words "tenant-right yet to come and unexpired," which signify all that the tenant would have a right, as such, to collect during the term, but for the terms of the instrument.

ALDERSON, B.—I am of the same opinion. It is impossible to give effect to the whole deed without holding that the "tenant-right" includes the way-going crop. As to the question, whether it may pass by such deed, the case cited from *Hobart* is quite decisive.

ROLFE, B., concurred.

Rule absolute to enter a verdict for the defendant.

(a) 2 Brod. & B. 262.

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ALDER and Another, Assignees of JOHN BIRKHILL, a Bankrupt, v. KEIGHLEY.

Jan. 28.

**ASSUMPSIT.**—The declaration stated, that heretofore, and before the said John Birkhill became a bankrupt, to wit, on &c., in consideration that the said John Birkhill would indorse and deliver to the defendant a certain bill of exchange for the sum of £600, drawn by the said John Birkhill, the defendant promised the said John Birkhill to discount the said bill, he the defendant retaining to himself the sum of £100. Breach, that the defendant did not discount the bill, &c. Plea, non assumpsit.

At the trial, before *Rolfe*, B., at the last York Assizes, the following facts were deposed to by the bankrupt, Birkhill:—Before his bankruptcy, he was indebted to the defendant in the sum of £500 for a quantity of peas sold to him, and, being pressed by the defendant for payment of £100, in part discharge of the debt, produced a bill drawn by him upon one Jackson for the sum of £600, which the defendant agreed to discount, on the terms of retaining to his own use the sum of £100 and the discount, and paying over the difference to Birkhill. The defendant, however, retained the bill, and paid no part of the difference to Birkhill. Birkhill a short time afterwards became bankrupt, and the plaintiffs were appointed his assignees, and brought the present action to recover from the defendant the amount of the bill of exchange, minus the £100 agreed to be retained, together with the discount. The defendant gave some evidence to shew that the bill had been accepted for the accommodation of Birkhill. The learned Judge, in summing up, directed the jury, that if Birkhill was to be believed, the assignees, who stood in the same situation as the bankrupt, if solvent, would have stood in, were entitled to recover the £600, minus the £100 and

B., being indebted to the defendant in the sum of £500 for the price of goods sold to him, and being pressed for part payment of the debt, handed to the defendant a bill of exchange, drawn by himself, for £600, which the defendant agreed to discount, on the terms of retaining to his own use the sum of £100 and the discount, and paying over the difference to B.: he, however, retained the bill, and paid no part of the proceeds over to B. B. shortly afterwards became bankrupt:—*Held*, that his assignees were entitled to recover from the defendant the full amount of the bill, minus the £100, and such discount as the jury should find to be receivable by the defendant.

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the discount. The jury found a verdict for the plaintiffs, damages £495, and the learned Judge reserved leave to the defendant to move to reduce the damages to 1s.

In Michaelmas Term last, *Baines* obtained a rule nisi accordingly, or for a new trial, on the ground of misdirection; against which

*Martin* and *Archbold* now shewed cause.—The ruling of the learned Judge was perfectly correct. The assignees of this bankrupt stood precisely in the same condition in which the bankrupt himself stood at the moment of the breach of contract. Now it is clear, that, if he had continued solvent, he would have been entitled to recover the whole amount of the bill. *Hill v. Smith* (a) is expressly in point to that effect. [*Pollock*, C. B.—It is as if a man had agreed to buy and pay for a lottery ticket at a certain price, and then, when it turned up a blank, were to say that the seller was entitled only to nominal damages.] Yes: it does not lie in the mouth of the defendant to say that he will not pay according to his contract, merely because a bankruptcy has intervened. His liability cannot be affected by subsequent circumstances, which might or might not have happened if the contract had been performed. [*Alderson*, B.—If the defendant had agreed to buy a horse, and give £500 for it, though the seller became bankrupt, must he not pay it? It is the same here, where he buys a bill of exchange.] *Key v. Flint* (b) and *Buchanan v. Findlay* (c) are also authorities against this application.

*Baines* and *J. Henderson*, contra.—It is not meant to be argued that the jury *might not* in this case give the whole sum of £500 by way of damages, but that the learned Judge was wrong in telling them, that, *in point of law*, that sum was the measure of the damages. It was a question for them to

(a) 12 M. & W. 618. (b) 8 Taunt. 21. (c) 9 B. & C. 738.

say, if they believed the evidence of the bankrupt, what amount of damages they would give. The case of *Hill v. Smith* is quite distinguishable. There a sum was paid over to the defendants in cash, to be applied in a particular way, and was misapplied by them. This is the case of a *chattel*, whose true value the jury are to estimate upon all the facts. The transaction is not to be viewed as a sale, but rather as a tortious obtaining of a bill of exchange, which is the subject of trover. In such a case, its *real value* must constitute the true measure of damages. The contract found by the jury does not import a liability to liquidated damages. It is not a contract to pay a definite sum of money, but merely to discount a bill of exchange, *i. e.* to pay over the amount of the bill, subject to some uncertain deduction for discount. The Court cannot presume, as matter of law, what that would amount to; the law now imposes no limitation upon it. [*Rolfe, B.*—All that I told the jury was, that the plaintiffs were entitled to recover the whole sum which the defendant undertook to pay over to Birkhill; *i. e.* the amount of the bill, less the £100 and the discount; which they found to be £495.]

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POLLOCK, C. B.—I think this rule ought to be discharged. With respect to the alleged misdirection, it was no more than this, that the learned Judge directed the jury, that, if they believed the witness, and found the contract to be as alleged in the declaration, the plaintiff was entitled to recover the amount of the bill, less the £100 and the discount, leaving it to them to settle the question as to the amount of discount. The jury acted upon the principle of £5 per cent. being the proper amount, and found a verdict for £495. If this had been an action of trover for the bill, no doubt it would have been altogether a question for the jury as to the amount of damages. So, also, if it had been an accommodation bill, or the bankrupt's own bill. But this is not a case of trover, but of breach of contract. The defendant, according to the finding of the jury, promised to deliver to



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the bankrupt the amount of the bill, minus £100 and the discount. The bankrupt would have to receive that sum, and his assignees are entitled to recover the same amount which he would have been entitled to receive, if he had continued solvent, by reason of the breach of contract. There is no substantial distinction between this case and that of *Hill v. Smith*; the question is, what was the contract, and was it broken by the defendant? No doubt, all questions of damages are, strictly speaking, for the jury; and, however clear and plain may be the rule of law on which the damages are to be found, the act of finding is for them. But there are certain established rules according to which they ought to find; and here there is a clear rule—that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken. I think, therefore, there was no misdirection in this case.

ALDERSON, B.—I am of the same opinion, that there was no misdirection. The learned Judge told the jury, that the amount of money which the defendant had agreed to pay to Birkhill, was the amount that was to be paid by him as damages. I think that was a perfectly correct direction; and with that direction he left the case to the jury, upon the credit they gave to Birkhill, upon whose evidence the discount to be paid certainly was the ordinary discount of £5 per cent. The jury did believe Birkhill, and, that being so, the verdict is perfectly right.

ROLFE, B.—I am of the same opinion. Mr. *Henderson* seems to suppose that the jury decided nothing as to the amount of damages. That is a mistake. They gave no opinion upon the principle of law laid down by me, but I certainly never meant to withdraw from them the question as to the amount of the discount; but, supposing Birkhill to be believed, all parties seemed to assume that the discount was to be the ordinary discount of £5 per cent.

Rule discharged.

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Jan. 26.

## YOUNG v. SMITH.

**ASSUMPSIT** for work and labour, money lent, money paid, and on an account stated.

Plea, that, after the passing of a certain act of Parliament made and passed &c., intituled "An Act for the Registration, Incorporation, and Regulation of Joint-stock Companies" (7 & 8 Vict. c. 110), and after the 1st day of November, A.D. 1844, to wit, on &c., the plaintiff, for and on behalf of the defendant, bought, sold, and disposed of divers, to wit, 5000 shares in the capital stock and funds of certain joint-stock companies, the formation of which said joint-stock companies respectively was commenced after the 1st day of November, A.D. 1844, to wit, of a certain joint-stock company called "The Churnet Valley Railway Company," &c., [setting out the titles of several other railway companies.] And the defendant further saith, that the said work in the first count mentioned to have been done by the plaintiff for the defendant was and is work done by the plaintiff in, about, and in respect of the buying, selling, disposing by sale, for and on account of the defendant as aforesaid, of the said shares in the said several joint-stock companies respectively. [The like averment as to the counts for money lent, money paid, and on an account stated.] And the defendant further saith, that, at the time of the buying, selling, and disposing by sale of the said shares in the said joint-stock companies respectively as aforesaid, the said joint-stock companies respectively had not, nor had any of them, been completely registered, nor had they or any of them, nor any person for them or on their behalf, obtained a certificate of complete registration, according to the provisions of the said act.—Verification.

The 26th section of the Joint-stock Registration Act, 7 & 8 Vict. c. 110, which prohibits the sale of shares, before complete registration, in any joint-stock company formed after the 1st November, 1844, does not apply to railway companies requiring an act of Parliament.

To this plea there was a replication, which was specially demurred to on several grounds; but, both parties being desirous of obtaining the opinion of the Court on the question

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raised by the plea, viz. whether the 26th section of the stat. 7 & 8 Vict. c. 110, applied to railway companies, it was agreed between them that the points of form arising upon the replication should not be discussed.

The case was argued by

*Jervis*, in support of the plea.—The question to be decided in this case is undoubtedly one of great importance, and one upon which it is understood that the opinions of the profession are divided; namely, whether the 26th section of the Joint-stock Registration Act, (7 & 8 Vict. c. 110), renders illegal the sale of shares in a railway company which was formed after the 1st day of November, 1844, and where the authority of Parliament is required for the execution of the railway. Clearly, the words of the 26th section, prohibiting subscribers and shareholders “in any joint-stock company,” the formation of which shall be commenced after the 1st of November, 1844, from disposing of their shares before the company shall have obtained a certificate of complete registration, are large enough, if read by themselves, to include railway companies; but the question certainly is, whether, reading the 26th in conjunction with the previous sections of the act, particularly the 2nd, the proper conclusion is, that railway companies are exempted out of the operation of sect. 26 (*a*). The proviso at the end of the

(*a*) Sect. 2 enacts, “That the act shall apply to every joint-stock company as hereinafter defined, established in any part of the United Kingdom of Great Britain and Ireland, except Scotland, or established in Scotland, and having an office or place of business in any other part of the United Kingdom for any commercial purpose, or for any purpose of profit, or for the purpose of assurance or insurance, (ex-

cept banking companies, schools, and scientific and literary institutions, and also friendly societies, loan societies, and benefit building societies respectively, duly certified and inrolled under the statutes in force respecting such societies, other than such friendly societies as grant assurances on lives, to the extent hereinafter specified); and that the term ‘joint-stock company’ shall comprehend every partner-

2nd section says, that, "except as hereinafter specially provided," the act shall not apply to any company for exe-

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ship whereof the capital is divided, or agreed to be divided, into shares, and so as to be transferable without the express consent of all the copartners, and also every assurance company or association for the purpose of assurance or insurance on lives, or against any contingency involving the duration of human life, or against the risk of loss or damage by fire, or by storm or other casualty, or against the risk of loss or damage to ships at sea or on voyage, or to their cargoes, or for granting or purchasing annuities on lives, and also every institution inrolled under any of the acts of Parliament relating to friendly societies, which institutions shall make assurances on lives, or against any contingency involving the duration of human life to an extent upon one life, or for any one person, to an amount exceeding £200, whether such companies, societies, or institutions shall be joint-stock companies or mutual assurance societies, or both; and also every partnership which at its formation, or by subsequent admission, (except any admission subsequent on devolution, or other act in law), shall consist of more than twenty-five members; and that, except where the provisions of this act are expressly applied to partnerships existing before the said 1st day of November, it shall be held to apply only to partnerships the

formation of which shall be commenced after that date: Provided nevertheless, that, except as hereinafter specially provided, this act shall not extend to any company for executing any bridge, road, cut, canal, reservoir, aqueduct, waterwork, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without obtaining the authority of Parliament; Provided also, that, except as hereinafter specially provided, this act shall not extend to any company incorporated, or which may be hereafter incorporated, by statute or charter, nor to any company authorised, or which may be hereafter authorised, by statute or letters patent to sue and be sued in the name of some officer or person."

Sect. 25 enacts, "That, on the complete registration of any company being certified by the registrar of joint-stock companies, such company, and the then shareholders therein, and all the succeeding shareholders, whilst shareholders, shall be and are hereby incorporated, as from the date of such certificate, by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this act and of such deed as aforesaid; and for the purpose of su-

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cuting (inter alia) any railway which cannot be carried into execution without the authority of Parliament. The true

ing and being sued, and of taking and enjoying the property and effects of the said company; and thereupon any covenants or engagements entered into by any of the shareholders, or other persons, with any trustee, on the behalf of the company, at any time before the complete registration thereof, may be proceeded on by the said company, and enforced in all respects as if they had been made or entered into with the said company after the incorporation thereof; and such company shall continue so incorporated until it shall be dissolved, and all its affairs wound up, but so as not in anywise to restrict the liability of any of the shareholders of the company under any judgment, decree, or order for the payment of money which shall be obtained against such company, or any of the members thereof, in any action or suit prosecuted by or against such company in any court of law or equity, but every such shareholder shall, in respect of such monies, subject as after mentioned, be and continue liable as he would have been if the said company had not been incorporated; and thereupon it shall be lawful for the said company, and they are hereby empowered, as follows, (that is to say), 1st, to use the registered name of the company, adding thereto "Registered;" and also, 2ndly, to have a common seal (with power to break, alter, and change the

same from time to time), but on which must be inscribed the name of the company; and also, 3rdly, to sue and be sued by their registered name, in respect of any claim by or upon the company, upon or by any person, whether a member of the company or not, so long as any such claim may remain unsatisfied; and also, 4thly, to enter into contracts for the execution of the works, and for the supply of the stores, or for any other necessary purpose of the company; and also, 5thly, to purchase and hold lands, tenements, and hereditaments in the name of the said company, or of the trustees or trustee thereof, for the purpose of occupying the same as a place or places of business of the said company, and also (but nevertheless with a license general or special for that purpose, to be granted by the committee of the Privy Council for Trade first had and obtained) such other lands, tenements, and hereditaments as the nature of the business of the company may require; and also, 6thly, to issue certificates of shares; and also, 7thly, to receive instalments from subscribers in respect of the amount of any shares not paid up; and also, 8thly, to borrow or raise money within the limitations prescribed by any special authority; and also, 9thly, to declare dividends out of the profits of the concern; and also, 10thly, to hold general meetings period-

exposition of the two enactments taken together would seem to be, that the sale of shares in *provisionally* registered rail-

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ically, and extraordinary meetings, upon being duly summoned for that purpose; and also, 11thly, to make from time to time, at some general meeting of shareholders specially summoned for the purpose, bye-laws for the regulation of the shareholders, members, directors, and officers of the company, such bye-laws not being repugnant to or inconsistent with the provisions of this act, or of the deed of settlement of the company; and also, 12thly, to perform all other acts necessary for carrying into effect the purposes of such company, and in all respects as other partnerships are entitled to do: and the said company are hereby empowered and required, 13thly, to appoint from time to time, for the conduct and superintendence of the execution of the affairs of the company, a number of directors, not less than three, for a period not greater than five years, with or without eligibility to be re-elected at the expiration of the term, as may be prescribed by any deed of settlement or by law; and also, 14thly, to appoint and remove one or more auditors, and such other officers as the deed of settlement under which the company shall be constituted may authorise; subject, nevertheless, with respect to all such powers and privileges, to the provisions of this act, and subject, also, to the provisions of the deed of settlement of the company, or any

other special authority: Provided always, with regard to any company for executing any bridge, road, cut, canal, reservoir, aqueduct, waterwork, navigation, tunnel, archway, railway, pier, port, harbour, ferry, or dock, which cannot be carried into execution without obtaining the authority of Parliament, that, on the complete registration of any such company, and before such company shall have obtained its act of incorporation, or other act, whereby the authority of Parliament shall be granted for executing such work, it shall not be lawful for any such company, or the directors or officers thereof, to exercise the hereinbefore-mentioned power to enter into contracts, otherwise than conditionally upon obtaining such act, or to exercise the power to purchase and hold lands as aforesaid, or to exercise the power to receive instalments from shareholders beyond the sum or percentage necessary to be deposited in compliance with the Standing Orders of either House of Parliament, or such other sum as may be requisite for obtaining the act of incorporation, or other act, for granting the authority of Parliament to execute such work, or to exercise the power to borrow money as aforesaid, or to exercise the power to declare dividends as aforesaid; and, subject to these last-mentioned exceptions, all the powers by this enactment

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ways is forbidden. The words "except as hereinafter provided," can hardly mean that railways, &c. must thereafter

hereinbefore given to any company completely registered, except the general power to perform all acts necessary for carrying on the business of the company, may be exercised as fully by any such company so completely registered as by any other company so completely registered: Provided always, that it shall be lawful for any such company to perform all acts which may be necessary for obtaining an act of incorporation, or other act for obtaining the authority of Parliament to execute its works as aforesaid, anything herein contained to the contrary notwithstanding; and that, upon obtaining such act of incorporation, or other such act as aforesaid, or at the time of the coming into operation of such act, as shall be thereby appointed, all the powers which any such company shall obtain by virtue of this act, and all the provisions and regulations of this act which shall apply to such company, shall cease and determine, except so far as shall be otherwise provided by such act of incorporation, or other such act as aforesaid."

Sect. 26 enacts, "That no shareholder of any joint-stock company completely registered under this act shall be entitled to receive any dividends or profits, or be entitled to the remedies or powers hereby given to shareholders, until he shall have executed the deed of settlement of the said

company, or some deed referring thereto, and also have paid up all instalments or calls due from him, and shall have been registered in the registry office aforesaid; and, further, that it shall be lawful for every shareholder, who shall have signed such deed, and paid up such instalments or calls, and shall have been registered, and he is hereby entitled, to be present at all general meetings of the company, and also to take part in the discussions thereat, and also to vote in the determination of any question thereat, and that either in person or by proxy, unless the deed of settlement shall preclude shareholders from voting by proxy, and also to vote in the choice of directors, and of every auditor to be elected by the shareholders, subject, nevertheless, to the provisions of this act, and of the deed of settlement of the company, or other special authority, so far as such provisions shall either regulate or restrict the exercise of such powers, but not so as to deprive such shareholders thereof; and, further, with regard to subscribers, and every person entitled or claiming to be entitled to any share in any joint-stock company the formation of which shall be commenced after the 1st day of November, 1844, that, until such joint-stock company shall have obtained a certificate of complete registration, and until any such subscriber or person shall have



be *specially named*; and in substance, and according to the reasonable construction of the 26th section, they are "specially provided for" by that section. All the sections from the 23rd to the 26th inclusive are comprehended under the general marginal words in italics—"Powers and privileges of companies;" which is not the mere marginal note of the framer or editor of the act, but part of the act itself, and a legislative exposition of its meaning and extent. Now the 23rd and 24th sections seem clearly to apply to railways, in common with other joint-stock companies, although railways are not expressly named therein; which shews that, as has been observed, the words "hereinafter specially provided for" do not mean that they must be provided for *by name*, but only that provisions applicable to them, in common with other undertakings, shall be found in the subsequent clauses of the act. If so, there seems no sufficient reason for holding that the unqualified words of the 26th section are not also to include railway companies. It may be said, that the mention of "a certificate of *complete* registration," in that section, shews that railways were not meant to be comprehended in it, because complete registration would be useless to railway companies, if they had obtained an act of Parliament; but that consideration alone can hardly be deemed sufficient to limit the previous general words of the clause to mere joint-stock trading companies; and certainly the object of the act of Parliament, which was to place a

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been duly registered as a shareholder in the said registry office, it shall not be lawful for such person to dispose, by sale or mortgage, of such share or of any interest therein; and that every contract for, or sale or disposal of such share or interest shall be void; and that every person entering into such contract shall forfeit a sum not exceeding 10l.; and that, for better protecting

purchasers, it shall be the duty of the directors of the company, by whom certificates of shares are issued, to state on every such certificate the date of the first complete registration of the company, as before provided; and that if any such director or officer knowingly make a false statement in that respect, then he shall be liable to the pains and penalties of a misdemeanour."



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check upon wild and ruinous speculation, by preventing the sale of shares in mere visionary *projects*, applies at least as much to railway companies as to others.

*Martin, contra.*—The true construction of the 26th section is, that it applies only to cases where the authority of Parliament is not required for carrying into effect the objects of a joint-stock company; and the proviso in sect. 2 therefore clearly operates upon sect. 26. By the 4th and 7th sections, *all* joint-stock companies are required to be provisionally registered in the first instance, and also to be *completely* registered before they have power to act for all purposes. But, by sect. 9, railway companies which require the sanction of Parliament to the execution of their works are enabled to obtain all the benefits of complete registration, by depositing their plans and sections at the times and in the manner prescribed by the act. *Complete* registration, in truth, is necessary only in cases where the company is to be formed and to carry on its operations without the aid of Parliament, and has no application to companies which, as in the case of railways, must go to Parliament in order to carry their objects into execution. When they have passed that ordeal, and obtained their act of Parliament, complete registration becomes useless and unnecessary, because thenceforth they are governed and regulated by the provisions of their act. It follows, that, inasmuch as the prohibition of the 26th section is in terms applied to companies which require a certificate of complete registration, it cannot apply to railways, to which a certificate of complete registration is unnecessary. [*Alderson, B.*—It seems to be plain that the 25th and 26th sections do not apply to the same description of company. The 25th section says, that, with respect to companies obtaining an act of Parliament, all the provisions of the act shall thereupon cease. Then the 26th section provides, that, until the company shall have obtained a certificate of complete registration, no subscriber &c.

shall dispose of his shares. The result appears to be, that while the 25th section declares that the companies therein mentioned are to be governed by their own acts, the 26th says, in effect, that they are to be subject to the prohibition of this act. That is an inconsistency which seems to shew clearly that the two sections refer to different descriptions of companies.] And that the latter section does *not* apply to railway companies. Moreover, as the clause imposes penalties for the infringement of its provisions, it ought to receive a strict construction.

*Jervis* was heard in reply.

POLLOCK, C. B.—The plea to this action for work and labour is substantially this, that the work was done after the passing of the 7 & 8 Vict. c. 110, and that it was done in respect of the sale of shares in a joint-stock company, the formation of which was commenced after the 1st of November, 1844, and which at the time of the work done was not completely registered in the mode pointed out by that statute. The question is, whether this plea is good or not. Mr. *Martin* contends, that, comparing the 2nd section of the statute with the 26th section, and applying the strict rules of legal construction, the provision of the 26th section, which renders void all contracts for the sale of shares in joint-stock companies formed since the 1st of November, 1844, unless the company shall have obtained a certificate of complete registration, and subjects to a penalty all parties entering into such contracts, does not apply to a joint-stock company which has for its object the construction of a railway, which cannot be carried into effect without the aid of an act of Parliament. And he also contends, that not only is this the true construction of those sections, but that such was the meaning of the legislature when they passed the statute. I think he has made out both those propositions; and that, on the true construction of the 26th section, the case of the

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as this, such companies would, of course, both be bound to register provisionally in the first instance, and afterwards obtain a complete registration. But it is clear that this is not so, for the act expressly gives them the power to obtain a provisional registration, which by the 23rd section is to continue in force for twelve months, and enables them during that time to assume the name of the company, to open subscription lists, allot shares, and receive sums of money, both by way of deposit as earnest, as also for the purpose of enabling them to comply with the standing orders of the House of Commons, and to perform such other acts only as are necessary for constituting the company, or for obtaining letters patent, or a charter, or an act of Parliament. This, as it appears to me, leaves it open to the promoters of such a company to constitute it without the aid of an act of Parliament, but for particular purposes only; and what they may do while in this state, as well as what they may do by *complete* registration, and without the assistance of Parliament, is pointed out in the 25th section; but under the 23rd section they may be provisionally registered and get an act of Parliament, without any complete registration at all; and the 25th section provides, that upon obtaining an act of incorporation, &c., all the powers which they obtain by virtue of this act, that is to say, either by provisional or complete registration, and all the provisions and regulations of this act, shall cease and determine. It seems to me, therefore, that the 25th section expressly exempts parliamentary joint-stock companies from the operation of this act, so soon as they shall appear to have obtained a complete registration, and after an act of Parliament; and I am of opinion, also, that if such a company, without being completely registered, obtain an act of Parliament, it does not come within this act at all. I think, therefore, that this plea is bad, and discloses no defence to the action, and consequently our judgment must be for the plaintiff.

ALDERSON, B.—I agree with the Lord Chief Baron in thinking that the case is not within the 26th section. That section provides, that, “until such joint-stock company” (which expression, by reference to the beginning of the section, means “any joint-stock company completely registered under this act,”) shall have obtained a certificate of complete registration, and until any such shareholder or person shall have been duly registered as a shareholder in the said registry office, it shall not be lawful for such person to dispose by sale or mortgage of such share, or any interest therein, and that every contract for the sale or disposal of such share or interest shall be void;” and it then subjects to a penalty every person entering into such a contract. The first question then is, what is the meaning of the words “joint-stock company” as used in the 26th section? *Primâ facie*, they must be taken to include any joint-stock company of the nature intended to be legislated for in the act, for the words are, “*any* joint-stock company.” Now we must look at the interpretation clause to discover the intention of the legislature in using those words: and this will be found in the 2nd section, which describes what the words “any joint-stock company” mean in the statute generally; that is to say, “any partnership whereof the capital is divided, or agreed to be divided into shares, and so as to be transferable without the express consent of all parties:” they also include “every assurance company for the purpose of assurance on lives, or against any contingency involving human life, against the risk of loss or damage by fire, or by storm or other casualty, or against risk of loss or damage to ships at sea or on voyages, or to their cargoes, or for granting or for purchasing annuities on lives,” &c. The section further includes “every partnership, which at the formation, or by subsequent admission, (except an admission consequent on devolution or other act in law), shall consist of more than thirty-five members.” Those are the classes of joint-stock companies to which the statute *primâ*

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facie applies, according to the interpretation clause; but that clause contains a proviso, that the act shall *not* extend to “any company for executing any bridge, road, cut, canal, reservoir, aqueduct, waterworks, navigation, tunnel, archway, *railway*, pier, port, harbour, ferry, or dock, which cannot be carried into execution without obtaining the authority of Parliament.” Then we have got thus far, that the expression “joint-stock company” does apply to all joint-stock companies previously described in this section, but not to such as are for the purpose of making or carrying on a railway, which requires the authority of Parliament for its completion. However, even on this proviso is engrafted an exception, that is to say, that the act is not to extend to the cases just enumerated, “*except as hereinafter specially provided.*” Therefore, the whole conclusion on this point, to be drawn from the 2nd section, is, that the statute applies to all joint-stock companies, except railway companies (with some others mentioned) when they require the assistance of Parliament, and to them when specially provided for in the present act. That is the true construction of the interpretation clause, which raises the only real difficulty in this case. How, then, are we to interpret the words “joint-stock company,” as used in the 26th section? We must, unless railway companies are specially mentioned in that clause, read joint-stock companies as meaning joint-stock companies such as are defined to be within the meaning of those words in the 2nd section, and which have obtained complete registration under the act, and which the legislature says, in this section, shall not transfer their shares until such complete registration. It is clear, therefore, that this railway company is not within the expression “joint-stock company” in this section, seeing that it is a company for executing a railway, and is not specially mentioned in the clause, and therefore not within the act. Such is the true and proper exposition of the 26th section, when taken together with the interpretation

clause. Then is there anything in the other parts of the statute inconsistent with this view? I see none, and I do not think that a company of this nature was intended to be included in the 26th section; for I should conjecture from the statute, that the intention of the legislature was to make certain provisions for railway companies and others, until the 25th section, in which it is finally provided, that railway companies, &c., having obtained the authority of an act of Parliament, shall be bound by that; and after that section, the legislature proceeds to make regulations for the transfer of shares of joint-stock companies of a different description; for in all the clauses of the statute subsequent to the 25th, there is no reference made to railway or other companies which are excepted out of the interpretation clause. I therefore think, that the object of the legislature was to make certain general provisions, down to the 25th section, and thenceforth further special provisions for the companies not specially provided for before. The 26th section, therefore, does not apply to a railway company, which requires the authority of an act of Parliament, and has not got one; and this plea is consequently bad, inasmuch as the contract between the parties was for the transfer of shares in a railway company, which was excepted from the operation of the statute.

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PLATT, B.—I am of the same opinion. The 26th section, being of a penal nature, requires a strict construction: but it is plain to me that the legislature only contemplated the case of a company which required complete registration. Now, generally speaking, in the case of a railroad, complete registration is not necessary. The 23rd section empowers companies which have provisionally registered to act for a period of twelve months under such provisional registration, the object apparently being to give them an opportunity of applying to Parliament, and the period of twelve months being considered sufficient for that purpose. I agree with

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Mr. *Martin* in his construction of the 2nd and 3rd sections. The words in the 2nd section, "except as hereinafter specially provided," only apply to those cases where we find a special provision; and none such is to be found in the 26th section. In the 3rd section, the word "company" is to mean "any joint-stock company, or other institution," *as before defined*. That means all companies except railways, &c., unless such railways &c., are specially provided for in the 26th section: else they are not included within it. It is clear to me that the 26th section does not apply to any companies which require an act of Parliament before they can execute their works. The plea is therefore bad, and there must be

Judgment for the plaintiff.

Feb. 10.

SHAW v. HOLLAND (*a*).

The Leeds and Bradford Railway Company was incorporated by act of Parliament before the 1st

of November, 1844. After that day, the Company resolved to undertake the formation of an extension line of railway from the Leeds and Bradford Railway at Shipley, to Colne. A parliamentary contract was duly entered into accordingly, which recited, "that it had been deemed expedient that a railway should be made by the Leeds and Bradford Railway Company from Shipley to Colne, in extension of and uniting with the parliamentary line of the Leeds and Bradford Railway." An act of Parliament was accordingly obtained, intitled, "An Act of Parliament to enable the Leeds and Bradford Railway Company to make a Branch from Shipley to Colne." The shares in this line were allotted and offered to the shareholders in the Leeds and Bradford line; but there were, at the time of the passing of the act, shareholders in the extension line who were not shareholders in the Leeds and Bradford line:—*Held*, that the shareholders in the Shipley and Colne Railway did not constitute a company, the formation of which was commenced after the 1st day of November, 1844, within the meaning of the stat. 7 & 8 Vict. c. 110, s. 2.

In an action for the non-delivery of shares on a given day, pursuant to contract, the proper measure of damages is the difference between the contract price and the market price on the day when the contract was broken.

(*a*) This case was decided in the same subject as the preceding case. Hilary Vacation (Feb. 10), but it is inserted here as referring to

not be set aside, and a verdict entered thereon for the plaintiff, unless the parties agreed to a special case being stated for the opinion of this Court. The parties thereupon agreed to the following case.

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This action is brought by the purchaser upon a contract for the sale of fifty "New Bradford Extension" shares. The defendant, by his first two pleas, denied the making of the contract, and the readiness and willingness of the plaintiff to perform it. The third plea was as follows:—"And for a further plea in this behalf, the defendant says, that the said company or partnership undertaking in the declaration mentioned was, before and at the time of the making of the said contract in the declaration mentioned, and from thence hitherto, a joint-stock company, within the meaning of, and answering to the definition in that behalf given in and by a certain statute passed, &c., [7 & 8 Vict. c. 110]; and that the formation of the said company was commenced after the 1st day of November, A.D. 1844, to wit, on the 6th day of November, A.D. 1844. And the defendant says, that the said contract in the declaration mentioned was and is a contract for the sale by the defendant to the plaintiff of certain shares in the said company, to which said shares he the defendant, at the time of the making of the said contract, claimed to be entitled. And the defendant further says, that the said company had not, before or at the time of the making of the said contract, obtained a certificate of complete registration, according to the provisions of the said act in that behalf made:" concluding with a verification. And the fourth plea was as follows:—"And for a further plea in this behalf, the defendant says, that the said company or partnership undertaking in the declaration mentioned was, before and at the time of the making of the said contract in the declaration mentioned, and from thence hitherto, a joint-stock company, within the meaning of and answering to the definition in that behalf given in and by the said statute in the said plea mentioned, and that the formation of the said



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company was commenced after the 1st day of November, A. D. 1844, to wit, on &c. And the defendant says, that the said contract in the declaration mentioned was and is a contract for the sale by the defendant to the plaintiff of certain shares in the said company, to which said shares he the defendant, at the time of the making of the said contract, claimed to be entitled. And the defendant further says, that he the defendant had not, before or at the time of the making of the said contract, been duly registered as a member of the said company in the registry office by the said statute provided for the registration of joint-stock companies, according to the provisions of the said statute in that behalf made." Verification.—Issue was taken by replying *de injuriâ* to each of these pleas.

The cause was tried before *Rolfe*, B., at the York Summer Assizes, 1845, and the jury returned a verdict for the plaintiff on the first and second issues, and for the defendant, by the direction of the learned Judge, on the third and fourth issues, with an assessment of the damages at £675, subject to the opinion of the Court as to the finding on the third and fourth issues, and as to the amount of damages.

The following was the note or contract made by the broker :—

“3rd February, 1845.

“Sold to Mr. Joseph Shaw, on account, fifty shares in the New Bradford Railway; to be paid on or before the 30th of March, at 14*l.* 12*s.* 6*d.* per share, net.”

The shares in question were scrip for shares in a projected line of railway from Shipley to Colne, called “The Leeds and Bradford Extension Railway,” and were issued by the parties and under the circumstances hereinafter stated.

The Leeds and Bradford Railway Company is constituted by the stat. 7 & 8 Vict. c. 59, and is thereby authorised to make a railway from Leeds to Bradford. On the 15th of July, 1844, at a meeting of the directors of that company, it was resolved that an advertisement should be

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inserted in the papers, stating that the engineer had been instructed to make a survey from Keighley to Shipton, and that Mr. Martin should be engaged to survey the line from Shipley to Keighley. An advertisement was inserted in the newspapers in compliance with this resolution. At a meeting of the directors of that company, held on the 12th of August, 1844, a deputation of persons interested in this extension line waited upon the directors, when the directors of that company resolved that an account of the traffic should be taken between Shipley and Shipton; and Mr. Murgatroyd undertook to engage some person for that purpose. It was also resolved, that Mr. Martin's tender should be accepted for surveying the line from Shipley to Shipton. At a meeting held on the 26th of August, 1844, a deputation from the town of Haworth attended, who expressed a wish that a branch railway should be made from Haworth to join this line at Keighley; when they were informed that this company would propose to obtain power in the next session of Parliament to make it. At a general meeting of the company, held on the 28th of August, 1844, the directors presented a report to the meeting, the following passage from which has reference to the proposed line:—"The directors pledged the company, when in committee, to extend the line from Shipley to Keighley; and further considerations have induced them to decide on going forward to Shipton and Haworth. These extensions cannot fail to be remunerative to the company, as well as advantageous to the districts through which they pass; and it is hoped they will facilitate a junction with the Lancashire railways. Some other railways are under consideration, particularly to Halifax, and down the Cleckheaton Valley, and will be brought before the shareholders at a future opportunity."

At a meeting of the directors, held on the 9th of September, 1844, Messrs. Martin and Fox attended with plans and sections of the extension line from Shipley to Shipton and Haworth, and it was resolved that a cheque for £200

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be paid to them on account. At a meeting of the directors, held on the 4th of November, 1844, it was resolved, "that a special general meeting should be called on Wednesday, the 28th November then instant, for the purpose of considering the expediency of, and, if thought fit, sanctioning an application to Parliament in the ensuing session, for an act for enabling the said company to make a railway from Shipley, in the West Riding of the county of York, to Colne, in the county palatine of Lancaster, with a branch from Keighley to Haworth, in the said West Riding; and also for the purpose of considering in what manner the necessary capital for the construction of the said proposed line and branch should be raised." A special general meeting of the company was accordingly held on the 28th of November, 1844, in pursuance of the above resolution, at which the following resolutions were come to:—"First, that it is expedient that this company should undertake the formation of an extension line of railway from the Leeds and Bradford Railway at Shipley, to Colne, with a branch to Haworth; that the directors of the company be, and they are hereby authorised to take all proceedings that they may consider desirable, with a view of applying to Parliament in the next session for an act authorising the construction of the above railways, or any part of them. Secondly, that, in order to raise funds for the purposes aforesaid, an additional capital of £500,000 be raised, by the creation of 8000 shares at £50 each, and 8000 shares of 12*l.* 10*s.* each, and that such shares be offered in the first place to the proprietors who shall be registered in the books of the company on the 30th of November instant, in the proportions of one £50 and one 12*l.* 10*s.* share for every £50 share, and that a deposit of £5 per cent. be paid thereon to the bankers, Messrs. B. and Co., Leeds, or to the Bradford Banking Company, on or before the 21st of December then next." On the 6th of November, the Leeds and Bradford Company advertised in the Leeds Intelligencer and Mercury notice of the

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intended application to Parliament for an act to make a railway from Shipley to Colne, with a branch to Keighley; and on the 16th of November they advertised in the same papers notice of the intended application to Parliament, for an act to extend it by a branch from Keighley to Haworth. The shares mentioned in the above resolutions were accordingly issued, and were all offered and allotted to shareholders in the Leeds and Bradford Railway Company, and came out at a premium. There were shareholders in the extension line when the act authorising it was passed, *not* shareholders in the original line of the Leeds and Bradford. The contract in the present case was for the sale of fifty shares in the proposed extension line. There was no provisional registration of any company for making the extension line. A parliamentary contract, dated and signed on the 2nd of January, 1845, was entered into as required by the standing orders of Parliament, a copy of which, signed by the attornies on both sides, may be referred to, and made part of this case. Keighley is on the line of railway from Bradford to Colne, for which application was made to Parliament, in pursuance of the above resolutions, and for which an act was obtained, which received the royal assent on the 30th of June, 1845. The Leeds and Bradford Company obtained their act for their line on the 14th of July, 1844. No certificate of complete registration had been obtained by any company or persons for making the said railway at the time of the making of the contract in question in this cause, nor had the defendant been registered as a shareholder in any company for the shares in question.

The foregoing are the agreed facts in the cause. A question also arises as to the amount of damages. The jury assessed the damages at £675, but leave was reserved to move to reduce them to £450. It was proved, that, on the 10th of March, 1845, the price was such as to make a difference upon the fifty shares, amounting to £450. On

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the 3rd of March, 1845, the plaintiff caused the following letter to be written to the defendant's brokers:—

“Huddersfield, March 3rd, 1845.

“Gentlemen,—I beg to give you notice, that I am prepared to take up the fifty new Bradfords I purchased of you on the 3rd of February last; and if those scrips are not delivered to me on or before the 10th instant, I shall buy them in against you, and debit you with the difference.

“Yours respectfully,

“JOSEPH SHAW.”

The learned Judge told the jury that he did not consider the damages limited by the price within the time specified by that letter, and that the question of damages was for them; and that they were as near as they could to place the plaintiff in the position he would have been in if the defendant had performed his contract. They returned a verdict for £675; but the verdict was to be reduced to £450, if the Court should be of opinion that that sum was in point of law the proper measure of damages, and that the learned Judge ought to have so directed the jury.

*Cleasby*, for the plaintiff, in the first place relied upon the decision in *Young v. Smith*; but, it being intimated by the Court that they should not hear the question in that case re-argued in this court, and that the only way of impeaching that decision was by writ of error, and therefore the only question which ought now to be disposed of was, whether this was a company formed after the 1st of November, 1844;—he proceeded to argue, that this was *not* a company the formation of which was commenced after the 1st of November, 1844; for that the shares and shareholders in the Shipley and Colne line were not shares and shareholders in a *new* line, but in an extension of the Leeds and Bradford line; the Shipley and Colne line being to be constructed, not by

a newly-formed company, but by the Leeds and Bradford company; and the only reason for going to Parliament again being for the purpose of obtaining power to create new shares, and thereby to raise money for making an extension of the original line. This view of the case was confirmed by the language of the parliamentary contract, and by the provisions of the act itself. The former recited, that "it had been deemed expedient that a railway should be made by the Leeds and Bradford Railway Company from Shipley to Colne, in extension of and uniting with the parliamentary line of the Leeds and Bradford Railway." The title of the act was—"An Act to enable the Leeds and Bradford Railway Company to make a Branch from Shipley to Colne, with a Branch to Haworth;" and the 3rd section enacted, "that it should be lawful for the said company"—that is, the Leeds and Bradford Railway Company—"to raise, by creating new shares, in addition to the sum of money which they are authorised to raise by virtue of the said recited act, any further sum of money, not exceeding in the whole the sum of £500,000." And the 4th section provided, "that the capital so to be raised by the creation of new shares should be considered as part of the general capital of the said company, and should be subject to the same provisions in all respects, whether with reference to the payment of calls, or the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital, except as to the nominal amount or value of such shares, and the proportionate dividends thereon respectively, and except, also, as to any special advantages in favour of, or other regulations in relation to, such shares, which may be resolved on by any general or special general meeting of the said company, and except as to the amount and time of making and of payment of calls on such new shares, which the directors of the said company shall fix from time to time, as they shall think fit." By the 5th section, if the old shares are at a premium, the new shares were to be offered to the original shareholders.

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This, therefore, was in reality nothing more than the introduction of new members, for the purpose of the extension line, into the Leeds and Bradford Company, and not the formation of a new joint-stock company.

Secondly, with respect to the amount of damages, he urged that the period from the 10th of March, when the contract was broken, to the 30th, the day on which others were bought in by the plaintiff against the defendant, could not be considered an unreasonable time for the purchaser to take to make up his mind as to the re-purchase; and cited *Stewart v. Cauty* (a), where it was held, that, in an action for the non-acceptance of railway shares, the proper measure of damages was the difference between the price of the shares on the day when they ought to have been accepted, and on the day when they were re-sold, such re-sale being within a reasonable time. [*Parke, B.*—In the present state of things, we all know very well that half a day might be a reasonable time to allow for the purchase of shares.]

*Knowles*, contra, argued that the Leeds and Bradford and the Shipley and Colne Railway were essentially different undertakings; differing in their names, in the number of their constituent members, and in the value of their shares: that the stat. 8 & 9 Vict. c. 38, and the resolution of the directors of the 4th of November, 1844, both spoke of the Shipley and Colne as a new line of railway: that, further, there were provisions in the Leeds and Bradford Railway Act (the 7 & 8 Vict. c. 59), which could not be applied to the other line, *e. g.* those which inflicted penalties on persons obstructing the railway or works. Even if the names and capital of the companies were the same, that would not make them identical where their objects were different, and to be carried into effect by different means and in different places.

(a) 8 M. & W. 160.

PARKE, B.—In this case no question arises on the construction of the 26th section of the 7 & 8 Vict. c. 110. If the decision of this Court upon that section, in the case of *Young v. Smith*, is to be questioned, it must be in a court of error. The only question here is, whether this is the case of a new company, formed after the 1st day of November, 1844; and I think it is quite clear that it is not. The 8 & 9 Vict. c. xxxviii, was not intended, and does not purport, to incorporate a new company; it only extends the powers of an existing corporation, by enabling them to do what they had not power to do before, namely, to construct an extension line of railway, and for that purpose to raise capital by the creation of new shares, instead of by mortgage, or in some other way. It is said that the Shipley and Colne line was to be constructed for a different object, and not to benefit the shareholders in the Leeds and Bradford Company. But, although that company is incorporated by the first act, the right to the profits is the right of the individuals, who from time to time compose the company: the corporation is seised of the corporate property, and the individuals have their share of the profits or loss of the undertakings. The company remains the same, though the undertakings are different.

With respect to the amount of damages, I was at first disposed to think that this was like the case of an action for not replacing stock, in which the measure of damages is the difference of price on the day on which it ought to have been replaced, and on the day of the trial; but, upon consideration, I think it more resembles the case of an action for the non-delivery of goods. In the case of *Gainsford v. Carroll* (a), which was an action for not delivering goods on a given day, the Court held, that it was not like the case of a loan of stock, where the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether; for that the plaintiff, having his money in his

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(a) 2 B. & C. 624.



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possession, might purchase the like goods the very day after the contract was broken; and therefore that the true measure of damages was the difference between the price agreed upon and the market price of the goods at the time the contract was broken. Here the plaintiff had his money in his own possession, and might have gone into the market and bought other shares as soon as the contract was broken. The question therefore is, when it was broken. Now the plaintiff, by his letter of the 3rd of March, gave the defendant until the 10th of March to deliver the shares; and he is not, therefore, entitled to calculate the damages with reference to any amount the shares might have sold for subsequently to the 10th.

Our judgment, therefore, will be, to direct that the verdict on the 3rd and 4th pleas be entered for the plaintiff, and that the damages be reduced from £675 to £450.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule accordingly.

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REGINA v. The SHERIFF of MIDDLESEX, in a cause of  
 ROGERS v. TAYLOR.

The plaintiff recovered judgment against the defendant for £61, and a ca. sa. issued, indorsed to levy that sum, together with costs, &c. The sheriff having disobeyed a rule of Court to

bring in the body, an attachment issued against him, which was set aside on payment of costs, and on perfecting special bail. These terms not being complied with, owing to a mistake of the sheriff's officer, a habeas corpus issued to the coroner to bring up the body of the sheriff. The sheriff thereupon took out a summons to shew cause why, upon his complying with the previous rule, and paying the costs of the habeas, all further proceedings under it should not be stayed. Before this summons became returnable, the under-sheriff paid over to the plaintiff's attorney the full amount of the penalty of the bail-bond, and the costs. The Court made absolute a rule upon the plaintiff to refund to the sheriff the surplus beyond the £61 and costs.

JERVIS had obtained a rule, calling upon the plaintiff to shew cause why he should not refund the amount paid to him by the sheriff of Middlesex, after deducting therefrom the amount of the debt and costs. It appeared from the affidavits, that, in May last, the plaintiff commenced an action against the defendant, to recover the sum of 61*l.* 1*s.*, which proceeded to judgment, and a ca. sa. issued thereon

against the defendant, directed to the Sheriff of Middlesex, and indorsed to levy 61*l.* 1*s.*, together with the costs, &c. The sheriff having disobeyed a rule of court to bring in the body, an attachment issued against him, which was set aside in last Michaelmas Term, on payment of costs, and on perfecting special bail. These terms not having been complied with, owing to a mistake of the sheriff's officer, on the 18th of November a writ of habeas corpus issued to the coroner, directing him to bring up the body of the sheriff. The sheriff thereupon took out a summons, calling upon the plaintiff to shew cause why, upon the sheriff's complying with the previous rule, and paying the costs of the habeas corpus, all further proceedings under the writ should not be stayed. Before this summons became returnable, the under-sheriff paid over to the plaintiff's attorney the sum of 122*l.* 10*s.*, being the amount of the penalty in the bail-bond, with costs.

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*Montagu Chambers* shewed cause.—The plaintiff is entitled, under the circumstances, to retain the whole sum paid over by the sheriff, and is not limited to the sum indorsed on the ca. sa. The practice is thus stated in Archbold's Practice, 571 (7th ed.):—"When the proceedings are against the sheriff, the Court will not in general relieve him, if it appear that he has been guilty of a breach of duty, as by letting the defendant out of custody without taking from him such a bail-bond as is required by the statute." And again, "If the attachment be not set aside, the sheriff can be discharged from it only on payment of the whole debt and costs in the original action, to the extent of the penalty of the bail-bond, (and not merely the sum sworn to and costs), and also the costs of the attachment," &c. [*Pollock*, C. B.—This is not an application to set aside an attachment, but to get back a part of the sum that the sheriff has paid over to the plaintiff.] But, the sheriff having been guilty of this

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misconduct, and having paid the money over with knowledge of all the facts, he ought not to have it refunded.

*Jervis* was not called upon to argue in support of the rule.

POLLOCK, C. B.—It seems to me that the plaintiff cannot be entitled to retain more than the sum indorsed upon the writ and the costs, and that he must refund the rest to the sheriff. The sum paid over by the sheriff to the plaintiff is not in the nature of a penalty for misconduct. It is his duty to place the plaintiff in the same situation as if special bail had been put in and perfected regularly; and he does so by paying him the amount of the sum indorsed upon the writ. The rule must be absolute.

PARKE, B.—I am of the same opinion. The sheriff is to put the plaintiff in the same condition as if he had done his duty in the first instance, and had put in and perfected bail. The defendant in the action would be entitled to his discharge on payment of the sum indorsed on the writ, with £10 for costs. The rule of H. T., 2 Will. 4, s. 21, says, that “bail shall be liable to the sum sworn to by the affidavit of debt, and the costs of suit, not exceeding in the whole the amount of their recognizance.” Now the sheriff’s liability to the plaintiff is for not putting in bail; he is therefore to be responsible to the same extent as the bail would be, that is, in the amount of the debt and costs.

ALDERSON, B., and PLATT, B., concurred.

Rule absolute.

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**HAWKINS** had obtained a rule calling upon the defendant to shew cause why a rule absolute for judgment as in case of a nonsuit, and the judgment signed thereupon, should not be set aside. The affidavits disclosed the following facts:—The plaintiff, being under a peremptory undertaking to go to trial on the 10th of January, obtained the following side-bar rule to discontinue, pursuant to the rule of H. T., 2 Will. 4, s. 106:—"It is ordered, that, upon payment of costs, to be taxed by the Master, this action be discontinued, the plaintiff hereby undertaking to pay the said costs, and also hereby consenting, that, if the said costs are not paid within four days from the Master's allocatur, the defendant shall be at liberty to sign judgment of non pros." On the 10th of January, the plaintiff's attorney obtained, and served on the defendant's attorney, an appointment for taxation, at eleven o'clock on the 12th. On that day, the defendant's attorney attended before the Master, but protested against the rule as being irregular, and declined to bring in his costs to be taxed; and on the same day the rule absolute was obtained for judgment as in case of a nonsuit, and judgment was signed the following day.

*Bramwell* appeared to shew cause; but when he had stated the facts, the Court called upon

*Hawkins* to support the rule.—The defendant was irregular in applying for judgment as in case of a nonsuit after he had been served with a rule to discontinue: *Cooper*

The plaintiff, being under a peremptory undertaking to go to trial on the 10th of January, obtained a side-bar rule to discontinue on payment of costs, the plaintiff undertaking to pay the said costs, and consenting to judgment of non pros. if not paid in four days. On the 10th of January the plaintiff's attorney obtained and served on the defendant's attorney, an appointment for taxation, at eleven o'clock on the 12th, at which time the defendant's attorney attended before the Master, but protested against the rule to discontinue as being irregular, and declined to bring in his costs to be taxed; and on the same day he obtained a rule absolute for judgment as in case of a nonsuit:—*Held*, that this judgment was regular.

A rule to discontinue is not a stay of proceedings.

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v. *Holloway* (a), *Tihing* v. *Hodgson* (b). The judgment of discontinuance would have related back to the date of the rule: *Brandt* v. *Peacock* (c). At all events, the service of the rule to discontinue operated as a stay of proceedings. [*Pollock*, C. B.—Have you any authority for that position?] No express authority has been found, but it is reasonable that it should be so treated.

PER CURIAM (d).—This rule must be discharged. The defendant was entitled to his judgment as in case of a non-suit, and was not bound to accept instead of it the mere undertaking of the plaintiff to pay the costs. As to the other point, the Master informs us, that service of a rule to discontinue is not of itself any stay of proceedings.

Rule discharged, with costs.

(a) 1 *Hodges*, 76.  
 (b) 13 M. & W. 638.  
 (c) 1 B. & Cr. 649.

(d) *Pollock*, C. B., *Parke*, B.,  
*Alderson*, B., and *Rolfe*, B.

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## SIMS v. PROSSER.

GRAY having obtained a rule to shew cause why the judgment and fi. fa. in this cause should not be set aside for irregularity,

*Ball*, on shewing cause, objected that the affidavits (of the defendant and others) on which the rule had been moved for, were wrongly intitled. The writ of summons described the cause as "Henry Sims v. Frederick C. Prosser," whereas the affidavits were intitled, "Henry Sims v. Frederick *Coulston* Prosser." In *Regina v. The Sheriff of Surrey* (a), where an action had been brought against a defendant by the initial of his christian name, "W.," and proceeded to execution so intitled, it was held, that an affidavit, in support of the application against the sheriff for not returning the fi. fa., which described the defendant by his christian name of "William," could not be read. *Shrimpton v. Carter* (b) is an authority to the same effect.

Where the writ of summons described the defendant as "Frederick C. Prosser," an affidavit sworn by him in support of a rule for setting aside the judgment for irregularity, the title of which described him as "Frederick *Coulston* Prosser" (his real name), was held irregular.

*Gray*, contra.—The affidavits are correctly intitled. There is no doubt, from the affidavit made by the defendant, that his real name is Frederick *Coulston* Prosser, and that he is the party whose goods have been seized. There can be no reason, therefore, why the affidavit should not be made in his true name, although the stat. 3 & 4 Will. c. 42, enables the plaintiff, in the writ and declaration, to use his initial only.

PER CURIAM (c).—The affidavits are not properly intitled in the cause. The rule will be absolute without costs, the defendant undertaking not to bring any action.

Rule absolute accordingly.

(a) 8 Dowl. P. C. 510.

(b) 3 Dowl. P. C. 648.

(c) *Pollock*, C. B., *Parke*, B.,  
*Alderson*, B., and *Rolfe*, B.

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DIXON v. OLIPHANT.

A rule for an attachment for non-payment of costs pursuant to the Master's allocatur and rule of court, was refused, on the ground of a defect in the service of the power of attorney. A proper service was afterwards effected, and a fresh demand of the costs was made, and payment again refused:—*Held*, that a fresh rule might then be obtained for the attachment.

THIS was a rule for an attachment against the plaintiff, for non-payment of costs pursuant to a rule of court and the Master's allocatur thereon. The defendant had previously made the same application early in this Term, when it was refused, on the ground of a defect in the service of the power of attorney; but leave was given him to make a fresh application when a better service should have been effected. The present rule was accordingly obtained on an affidavit of a proper service of the power of attorney, and of a fresh demand of the costs, and refusal to pay them.

*Pearson* shewed cause, and contended that a party could not, after a motion of this kind has been made and refused, renew that motion on amended materials: *Levi v. Coyle* (a), *Ex parte Hasleham* (b).

*Oliphant*, contra, was stopped by the Court.

PER CURIAM (c).—There is no weight in this objection. In the cases cited, the same questions were brought before the Court on amended materials; but here there has been a fresh demand of the costs, and a fresh contempt, after a proper service of the power of attorney has been effected. The defendant proceeds upon new matter, and does not bring into question the former decision of the Court.

The case accordingly proceeded on the merits, and the rule was made absolute.

(a) 2 Dowl. P.C. (N. S.), 933.

(b) 1 Dowl. P. C. (N.S.), 792.

(c) *Pollock*, C. B., *Parke*, B.,  
*Alderson*, B., and *Rolfe*, B.

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BROOKE v. SPONG and Others.

Jan. 19.

**REPLEVIN.**—The defendants avowed and made cognizance for 12*l.* 10*s.*, being twenty-six weeks' rent, ending the 7th March, 1844, for a dwelling-house held by the plaintiff as tenant to the defendants, William Spong and William Spong the younger, under a demise theretofore made by them to the plaintiff, at the weekly rent of 9*s.* 7½*d.*

Plea in bar, that, before the demise in the avowry and cognizance mentioned, and before the defendants, William Spong and William Spong the younger, had any thing in the said dwelling-house, to wit, on the 14th January, 1837, one Robert Fearnley was seised in his demesne as of fee in the said dwelling-house in which, &c.; and the said Robert Fearnley, being so seised as aforesaid, afterwards, and before the 1st January, 1838, to wit, on the 14th January, 1837, duly made and published his last will and testament, &c., and thereby gave and devised unto Sally Fearnley, then being his wife, and to her assigns, for her natural life, in case the said Sally should so long continue his the said Robert Fearnley's widow, and not live with any other man except a father, or brother or brothers, one annuity or yearly rent-charge or sum of £25 per annum, to be issuing and payable out of the said dwelling-house, (amongst other hereditaments), and to be paid to the said Sally half-yearly, the first payment thereof to be made at the end of six months to be computed from his the said Robert Fearnley's decease. The plea then stated, that the will gave powers of entry and distress in case of non-payment of the annuity; and alleged the death of Robert Fearnley on the 20th January, 1837, without altering his will: whereupon and whereby the said Sally became seised as of freehold of the

The defendants in replevin having avowed for rent in arrear, the plaintiff pleaded in bar, that, before the defendants had anything in the premises, R. F. was seised in fee, and by his will gave to his wife an annuity (with power of distress), issuing out of the premises, for her life, if she should so long continue his widow, and should not live with any other man, except a father or brother or brothers. The plea then alleged the death of R. F. without altering his will, whereby his widow became seised of the annuity, and continued so seised until the plaintiff, in order to avoid a distress for arrears of the annuity, paid her the rent mentioned in the avowry:—*Held*, that the condition annexed by the will to the gift of the annuity

was a condition subsequent; and therefore it was not necessary that the plea in bar should aver the continuance of the widowhood, &c.



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said annuity or yearly rent-charge or sum of £25 per annum, issuing and payable as aforesaid, for and during the term of her natural life, in case she should so long continue the said testator's widow, and not live with any other man, except a father or brother or brothers, and payable half-yearly, &c., and continued so seised until the time of the making of the payment hereinafter mentioned. And the plaintiff further says, that, before the said time when &c., and during the life of the said Sally, to wit, on the 26th July, 1843, 12*l.* 10*s.*, being half of the said annuity, became due to the said Sally for the half-year ending the day and year last aforesaid, and continued due and in arrear to the said Sally until the plaintiff made the payment hereinafter mentioned. And thereupon afterwards, while the said last-mentioned sum was so due and in arrear to the said Sally, and after all the rent in the avowry and cognizance mentioned had become due, and before the said time when &c., to wit, on the 8th March, 1844, she the said Sally gave notice of the said several premises to the plaintiff, then being tenant of the said dwelling-house in which, &c., and required him to pay to her the said sum of 12*l.* 10*s.* in the said avowry and cognizance mentioned, in payment and discharge of the said sum of 12*l.* 10*s.*, so then due and in arrear to her as aforesaid, and demanded payment thereof from the plaintiff; wherefore the plaintiff, in order to prevent certain goods of him the plaintiff, then being in and upon the said dwelling-house, from being distrained by the said Sally for the said sum of 12*l.* 10*s.*, so then due and in arrear to her as aforesaid, after all the said arrears in the said avowry mentioned had accrued due as therein mentioned, and before the said time when &c., to wit, on the 8th day of March, 1844, paid to the said Sally the said arrears for which the said distress was made, as in the avowry and cognizance mentioned, in payment of the said sum of 12*l.* 10*s.*, so then due and in arrear to the said Sally as aforesaid. And so the plaintiff says, that nothing of the said 12*l.* 10*s.* of the rent in the said avowry and cognizance mentioned, was in arrear

to the defendants, William Spong and William Spong the younger, in manner and form, &c. Verification, and prayer of judgment.

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Special demurrer, assigning for causes, that it does not sufficiently appear upon the face of the plea that the said Sally was entitled to receive the half of the said annuity, or any part thereof, under the said will of the said Robert Fearnley, or that the plaintiff was justified in paying her the same as in the plea mentioned, or that such payment was other than a voluntary one; inasmuch as it is not averred or sufficiently stated in the plea, that, at the time when the said half of the said annuity became due, or at the time of the payment thereof by the plaintiff to the said Sally, she was, or that she had continued to be from the death of the testator Robert Fearnley, up to such times respectively, the widow of the said Robert Fearnley; or that she had not at or during such time lived with any other man except a father or brother or brothers; in any or either of which cases the said annuity would not, according to the provisions of the said will, have become due and payable to the said Sally. And that it is not alleged in the plea that the plaintiff paid the said half of the said annuity with the consent of the defendants, whose tenant the plaintiff was, or that they assented to such payment. And that the said plea amounts to a plea of *riens in arrere*. Joinder in demurrer.

The case was argued at the sittings in banc after last Michaelmas Term (December 4), by

*Robinson*, in support of the demurrer.— This plea in bar is bad, at least on special demurrer, for want of an averment that the wife of the testator continued his widow, and did not live with any other man except a father or brother or brothers. *Dayrell v. Hoare* (a) and *Fryer v. Coombs* (b)

(a) 12 Ad. & E. 356; 4 P. & D. 114.

(b) 11 Ad. & E. 403; 4 P. & D. 120.

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are distinct authorities to shew, that, where a party justifies in a right which he claims under the estate of a tenant for life, he is bound to allege the continuance of the life. The same doctrine applies to this case. In the *Doctrina Placitandi*, p. 90, there is a passage precisely in point:—"Estate for life was granted to a feme sole, quamdiu vixerit sola; in claiming this estate, she ought in pleading to shew performance of the condition, namely, that she was sole, according to the condition." Co. Litt. 42. a., and 214. b., and the case of *Putbury v. Trevilian* (a), are also authorities to the same effect. The argument on the other side no doubt will be, that this is the grant of an absolute estate, defeasible only by matter subsequent; but the authorities referred to shew that it is not so, but that it is a conditional limitation only. It is like the case of a lease for years, if A. shall so long live, in which case the continuance of the life ought to be averred: *Ingram v. Tothill* (b). [*Parke, B.—Ughtred's case* (c) is an authority against you.] The doctrine there stated is applicable only to the case of an estate which has vested; and there the averment which it was said ought to have been made, viz., an averment of the exercise of the office for the support of which the annuity was given, clearly referred to matter subsequent. [*Parke, B.—In Wynne v. Wynne* (d), where a rent-charge was devised to A., so long as her conduct and behaviour should be discreet, and meet with the approbation of J. S., the Court of Common Pleas were of opinion that the discreetness of her conduct and behaviour, and the approbation of J. S., were conditions subsequent, compliance with which need not be averred in a plea alleging the continuance of the rent-charge.] There was no direct decision in that case: the plaintiff elected to amend. How can it be assumed here that the widow ever began to live with a father or a brother?—The authorities on this subject are collected in the notes to *Thursby v. Plant* (e).

(a) Dyer, 142 b.

(b) 2 Mod. 93.

(c) 7 Rep. 9.

(d) 2 Man. &amp; Gr. 8; 2 Scott, N. R. 278.

(e) 2 Saund. 230 b.

*Addison*, contra.—In this case the annuity vested in the widow immediately on the death of the testator; and therefore the words which are relied upon on the other side amount to no more than a condition subsequent. That being so, according to the rules of pleading, the continuance of the widowhood, &c. need not be averred by the plaintiff; if there has been a breach of the condition, that should come by way of answer from the defendant. *Putbury v. Trevilian* is no authority against this view of the case; the present point was not determined: it appears that the averment, that the widow (to whom the lands were devised dum sola,) continued sole, was introduced upon the record by consent. In the passage cited from Co. Litt. 214. b., the only question considered is, whether the estate was defeated in fact, not whether an averment of the continuance of the estate was necessary in pleading. On the other hand, *Ughtred's case*, and *Wynne v. Wynne*, are direct authorities in favour of the plaintiff. And in Com. Dig. Pleader (C. 57), it is said, “Where an estate or interest passes or vests immediately, and is to be defeated by a condition subsequent or matter ex post facto, be it in the affirmative or negative, or to be performed by the plaintiff or the defendant or any other, performance of that matter need not be averred.” . . . . “If a grant be of an annuity to A. till he be advanced to a benefice, A., in annuity, need not say that he is not yet advanced: 7 Co. 10 a, b.” [He then proceeded to argue the point as to the plea amounting to riens in arrere, and cited Co. Litt. 303, and *Cecil v. Harris* (a).]

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*Robinson* was heard in reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

(a) Cro. Eliz. 140.

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PARKE, B.—The question on this case arises on a special demurrer to a plea in bar. The avowry is for rent of a dwelling-house, 12*l.* 10*s.*, due to the defendants. The plea in bar is, that, prior to the demise in the avowry mentioned, and before the defendants had anything in the dwelling-house, one Fearnley was seised in fee, and by will, duly executed, gave to his wife, Sally Fearnley, during the term of her natural life, in case she should so long continue his widow, and not live with any other man, except a father or brother or brothers, a rent-charge of 25*l.* per annum, issuing out of the dwelling-house, payable half-yearly, the first payment to be made at the end of six months after his decease, with power of entry and distress. The plea then avers that Fearnley died seised, leaving his wife surviving; that she continued seised until the time of payment; that half a year's annuity was in arrear to her; that the plaintiff, to prevent his goods being distrained, paid the amount to her, and so nothing of the rent distrained for was in arrear. To this plea in bar there is a special demurrer, assigning for cause (*inter alia*), that the right of the wife did not sufficiently appear.

On consideration of the arguments and authorities, we are of opinion that the objection ought not to prevail. It is no doubt an established rule, that one who derives a title or excuse under another who has a particular estate, must shew the continuance of that estate(*a*); and the question is, whether this plea in bar does so sufficiently. We think it does. That the life of the annuitant continued is expressly averred; but it was argued by Mr. *Robinson*, that it must be alleged also that she continued sole, and resided as required by the will. We are of opinion that this objection ought not to prevail. We do not rest the answer to the objection, on the ground that there is an averment of the performance of the condition by necessary implication; because, although it is stated that the wife

(*a*) 1 Wms. Saund. 235, n. 8.

continued *seised till* the time of payment, which certainly would be a sufficient averment of the continuance of the estate on general demurrer; Dyer, 304 b, *Scainter v. Johnson* (a); it is doubtful whether it would be good on special demurrer: see Lord *Hale's* opinion in *Harlow v. Bradnor*, as reported in 3 Keble, 151. But the reason why we think the objection untenable is, that, upon the weight of authority, the condition is a condition subsequent, in defeasance of the estate in the annuity, and not a condition precedent; and the breach of such condition ought to be shewn on the other side. There is no doubt a position, cited from a book of great authority, the *Doctrina Placitandi* (b), that, where an estate for life is granted to a feme sole quamdiu vixerit sola, in claiming the estate, she ought to shew performance of the condition, that she was sole; but there are many authorities to the contrary: and it is laid down as clear law in *Ughtred's case* (c), and in Plowden, 33, in the case of *Colthirst v. Bejushin*, that when the condition is subsequent to the estate, and goes in defeasance of it, it shall be pleaded by him who will take benefit by the defeasance; as if an annuity be granted to one until he shall be promoted to a benefice, he shall have a writ of annuity, without shewing that he is not advanced, for this goes in defeasance of the annuity, and ought to be shewn by him who will benefit by the defeasance; and accordingly it was decided in that case, by the majority of the Judges, that where an estate for the term of life was granted to the defendant, *if he would inhabit and reside during the term*, that was a condition *subsequent* to the estate, and in defeasance of it; and no averment of the performance of the condition was necessary by the party pleading the estate for life. The case of *Wynne v. Wynne* (d) is to the same effect; and, on the authority of

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(a) Sir Thos. Jones, 227.

in it than in any book he knew.

(b) The opinion of Lord C. J.

(c) 7 Rep. 9 b.

*Willes*, 2 Wils. 88, was, that  
there was more law and learning

(d) 2 Man. &amp; Gr. 8.

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these cases, we must hold that the estate for life did vest on the testator's death, and was liable to be defeated by the widow's marriage, or her residence in the manner prohibited in the will; and consequently that the plea in bar is good.

Judgment for the plaintiff.

Jan. 21.

DOE *d.* The Marquis of BUTE *v.* GUEST, Bart.

A. agreed to let, and B. to take a piece of land, with liberty to build thereon such warehouses, glasshouses, kilns, houses for workmen, and other erections necessary for carrying on the business of a glass manufactory, as he should think fit, for sixty-one years, at a certain rent; and B. agreed to pay the rent, to build in a substantial manner, and not to use the premises for any other purpose than a glass manufactory during the term. A lease and counter-part to be executed in conformity with the agreement, in which should

THIS action was brought to recover back from the defendant the land and premises mentioned in the following agreement:—

“ Memorandum of an agreement made the 24th day of June, 1824, between David Stewart, of Great Russell-street, in the county of Middlesex, the agent for and on the behalf of the Most Honorable John Crichton Stewart, Marquis of Bute and Earl of Dumfries, of the one part, and Josiah John Guest, of Dowlais, in the county of Glamorgan, iron-master, and William Jones, of Cardiff, in the same county, miller, of the other part, as follows:—

“ Lord Bute agrees to grant to Messrs. Guest and Jones, who agree to take of his lordship, all that piece or parcel of land on the east side of and fronting the towing-path of the Cardiff canal, and part of the Cardiff moors, in the parish of St. Mary, Cardiff, in the said county of Glamorgan, containing in front, next the said towing-path, and at the back or east part, 300 feet, and being in depth on the north and south side thereof 436 feet, the same being 400 feet from the north side of Sir William Smith's coal-yard there; with

be inserted all usual covenants:—*Held*, that this agreement did not warrant the insertion in the lease of an affirmative covenant by the lessee, that he *would* carry on the business of a glass manufactory on the demised premises during the term.

full power and liberty to build thereon such and so many warehouses, glasshouses, storehouses, kilns, dwelling-houses for workmen, not exceeding five to each cone, and other erections necessary for the purpose of carrying on a glass manufactory, as they shall think fit; to hold from this day, for the term of sixty-one years, at the clear yearly rent of 31*l*. 10*s.*, to be paid quarterly, the first quarterly payment to be made on the 29th day of September next. Messrs. Guest and Jones agree to pay the rent free from all taxes, rates, and deductions whatsoever; they further agree *not to use the premises for any other purpose than a glass manufactory during the term*; they also agree, at their own cost, to execute all the buildings and works erected on the premises in a good, substantial, and workmanlike manner, having power from time to time to alter the buildings for the purposes of the trade; the buildings so altered, or as originally erected, so to be kept and delivered up by Messrs. Guest and Jones, in good and sufficient repair. Lord Bute to have power to resume the possession of such part of the premises as he may require for any improvement he may wish to make, either for the enlarging the canal, or otherwise for the improvement or removal of it, giving Messrs. Guest and Jones a quantity of land equal to that resumed, adjoining on the east side of the said piece or parcel of ground hereby agreed to be let, and of equal width, and paying them such a sum for the improvements they may have made as arbitrators mutually chosen, or their umpire, shall award. *A lease and counterpart to be entered into in conformity with this agreement, wherein shall be inserted all usual covenants, clauses, and provisoes.* This agreement is entered into subject to Lord Bute's approbation. As witness the hands of the parties.

"Signed by the said David  
Stewart and Wm. Jones,  
in the presence of Wm.  
Biell.

BUTE.

"D. STEWART.

"For GUEST and Self,

"WM. JONES."

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Shortly after the execution of this agreement, it was arranged that the defendant should be the sole lessee, and he accordingly took possession under the agreement.

The ejectment was brought upon an alleged breach of the agreement on the part of the defendant. It was subsequently agreed upon to refer the action, and the following order of reference was drawn up. [The case then set out an order of reference made in the cause, whereby it was ordered that all further proceedings in the action should be stayed, and that it should be referred to a conveyancer, being a barrister, and to be named by the Solicitor-General for the time being, to settle the terms of the lease to be granted by Lord Bute to the defendant, under the terms of the above-mentioned agreement; and that Lord Bute should execute such lease so to be settled, and that the defendant should accept it, and execute a counterpart thereof, and give to Lord Bute his personal indemnity against any claim of the said William Jones, or any person or persons claiming under him.] Application was made to the Solicitor-General for the time being to appoint a barrister to settle the terms of the lease mentioned in the above order; and Mr. ——— was chosen by the Solicitor-General for that purpose. The following is a copy of the lease approved of by Mr. ———, as the form in which it is his intention to award that the lease should be executed:—

[The case then set out the draft lease, in which was contained the following covenant on the part of the defendant:]—

“ And further, that he the said Sir J. J. Guest, his executors, administrators, and assigns, shall and will at all times during the said term [of sixty-one years] hereby granted, use, exercise, and carry on, or cause and procure to be used, exercised, and carried on, in and upon the said demised premises, the trade and business of a glass manufactory, and shall not nor will at any time during the said term use the said premises or any part thereof, or permit or suffer the

same or any part thereof to be used, for any other purpose than a glass manufactory, without first obtaining the license or consent in writing of the said Marquis of Bute, his heirs or assigns, under his or their hand or hands."—There was also a proviso for re-entry by the lessor, his heirs and assigns, in case (amongst other things) the said Sir J. J. Guest, his executors, administrators, or assigns, should not at all times during the said term, use, exercise, and carry on, or cause or procure to be used, exercised, and carried on on and upon the demised premises, the trade and business of a glass manufactory.

The defendant contends, that the covenant contained in the lease, binding him to carry on during the term the business of a glass manufactory, is improper, and ought not to be inserted in the lease. The question for the opinion of the Court is, whether the proposed covenant, binding the defendant to carry on the trade during the term, is to form part of the lease or not.

If the Court should decide the above question in the affirmative, the covenant is to stand. If in the negative, the lease is to be remitted back to the arbitrator for re-consideration (*a*).

*W. P. Wood*, for the lessor of the plaintiff, argued that the intention of the parties, to be collected from the whole of their agreement, was, that the lessee should be *bound* to build upon the demised premises erections suitable for a glass manufactory, and to use them for that purpose during

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(*a*) The defendant had obtained a rule to shew cause why he should not have leave to revoke his submission, and why, if necessary, the order of reference and the appointment of the arbitrator should not be set aside. On the discussion of that rule, it was

agreed between the parties that it should be enlarged, and that a special case should be stated for the opinion of the Court, on the question whether the above covenant was a proper one to be inserted in the lease.

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the term: and that the rule of equity was, that, if such an intention could be reasonably inferred from the whole instrument taken together, although it was not stated in express terms, the Court would give effect to it, by requiring the introduction into the lease, to be executed in pursuance of the agreement, a covenant to that effect. He cited and referred to the following authorities:—*Fenner v. Hepburn* (a), *Webb v. Plummer* (b), *Earl of Shrewsbury v. Gould* (c), *Duke of St. Albans v. Ellis* (d), *Sampson v. Easterby* (e), *Saltoun v. Houston* (f).

*Crompton*, for the defendant, was stopped by the Court.

POLLOCK, C. B.—The question is, whether, on the agreement between these parties, we are to infer that it was the intention of both parties that Sir John Guest should enter into this covenant, and be bound thereby. Mr. *Wood's* argument consists of two parts: First, that, although this intention is not expressed in terms, still, if it is to be collected from the whole instrument that such was the intention of the parties, a Court of equity will carry it into effect; and the cases he has cited abundantly support that proposition. But the other branch of his argument is also to be established; namely, that it can be collected that such *was* the intention of these parties; and, in my opinion, no sufficient argument has been advanced to shew that such was their intention. I do not see anything to shew that Sir John Guest had any intention so to bind himself, or that Lord Bute had any reason so to expect. The parties expected that the trade of a glass manufactory *would be* carried on upon the premises, because they thought, no doubt, that trade would be profitable; but they never intended that the les-

(a) 2 Y. & C. Ch. C. 159.

(b) 2 B. & Ald. 746.

(c) Id. 487.

(d) 16 East, 352.

(e) 9 B. & C. 505.

(f) 1 Bing. 433.

sees should be *bound* to carry it on at all events, during this long term, at any loss. Looking at the agreement set out in the case, there is nothing to lead me to suppose that there was any such intention as would be effectuated by this covenant. I think, therefore, that it ought not to stand.

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PARKE, B.—I am of the same opinion. Nothing is to be introduced into the lease as matter of covenant, beyond the precise stipulations contained in the memorandum of agreement, unless we can make out clearly that the parties intended something more than they have expressed thereby. I cannot see that they did. No doubt, both of them *expected* that the trade would be carried on—that it would be a profitable business; and both parties intended it should be; but not that the lessees should be *bound* to carry it on for the whole term of sixty-one years, under all circumstances. No more, therefore, is to be put into the lease than the actual terms of the agreement. Then nothing turns on the practice of conveyancers, because it is admitted this is an unusual case.

PLATT, B.—It seems to me that the arbitrator has misconstrued the meaning of the parties. All the cases which have been cited only establish the well-known principle, that the intention of the parties is to be collected from the whole of the instrument. And the question here is, no doubt, what was the meaning of these parties, as they have expressed it in the agreement—looking at the whole document to ascertain it. [His Lordship read the agreement.] I do not see that it differs from the case of any ordinary lease which may be granted of a dwelling-house, with an agreement by the lessee to repair, and not to carry on a particular trade on the premises. Must he necessarily *dwell* in it, and use it as a dwelling-house during the term? Surely he may shut it up if he pleases: but the security to the landlord is, that the tenant must pay the rent, and therefore that it is

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his interest so to use it. The landlord may indeed limit that use: and so here, the landlord reckons on its being the interest of the lessees to use the premises as a glass manufactory, and limits the use of them to that purpose: nothing more. If the covenant which is now suggested was meant to be part of the terms of the agreement, why was it not expressly stated? Surely so important a stipulation would have been expressed in terms. We ought not, therefore, to extend the agreement beyond its ordinary meaning, merely on a speculation that such was the intention or the expectation of the parties. Lord Bute has not exacted an agreement to that effect from the defendant, and therefore he cannot be so bound.

The case was accordingly referred back to the arbitrator for re-consideration.



Jan. 24.

DRAPER v. CROFTS and BARTLETT.

Where there is a demise to A. and B. for a term, and B. holds over after the expiration of the term, without A.'s assent, A. is not liable for rent becoming due during such holding over.

**ASSUMPSIT** for use and occupation of a messuage, cottage, &c. The defendant Crofts pleaded non-assumpsit, and payment; the defendant Bartlett suffered judgment by default.

At the trial, before *Platt*, B., at the last Somersetshire assizes, it appeared that the plaintiff had let the premises to the two defendants by a written agreement, for three years, from Lady-day, 1840, to Lady-day, 1843. The defendant Bartlett alone actually occupied the premises, and paid the rent; and, after the expiration of the three years, he held over down to the year 1845. There was no evidence of any assent of Crofts to this holding over; and the only evidence offered to shew his knowledge of it was the following letter, which was written and sent to him by the plaintiff's attorney, on the 2nd of March, 1844:—

“ Sir,—I beg to call on you for payment of 43*l.* 15*s.*, remaining due from you and Mr. Theophilus Bartlett for rent of Mr. Draper’s premises, up to Christmas last, and I hope to receive it next Thursday.

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“ I am, &c.”

The defendant returned no answer to this letter ; and its reception in evidence was objected to on his part, on the ground that it furnished no evidence against him. The learned Judge, however, received it. It was objected also, that without some proof of assent by the defendant to the holding over by his co-tenant, he could not be made liable for the payment of rent which accrued due after the expiration of the original term ; and *Christy v. Tancred* (a) and *Tancred v. Christy* (b) were cited. The learned Judge declined to nonsuit, and left it to the jury to say whether the defendant Crofts had assented to Bartlett’s holding over the premises. The jury found that he did, and the plaintiff had a verdict, damages 29*l.* 9*s.*

*Greenwood*, in last Michaelmas Term, obtained a rule nisi for a new trial, on the grounds, first, that the letter had been improperly admitted ; and secondly, that the verdict was not warranted by the evidence.

*Butt* and *Phinn* now shewed cause.—There is no ground for saying that a letter of this nature, being shewn to have come to the hands of the defendant, is not admissible in evidence against him. [*Parke*, B.—Supposing it to be so, I can see no evidence sufficient to render the defendant liable. There is nothing to shew that he assented to the holding over by his co-tenant, Bartlett ; and then, if *Christy v. Tancred* be law, it is clear that one tenant cannot bind his co-tenant merely by holding over.] That case has been

(a) 9 M. & W. 438.

(b) 12 M. & W. 316.

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doubted, and has been reviewed in the court of error. [*Parke, B.*—The Court of Exchequer Chamber awarded a venire de novo, on the ground that the facts were not sufficiently stated on the face of the special case, to raise the question for their decision. If they had thought that one joint-tenant or tenant in common could bind his companion by holding over without his consent, they would not have directed a venire de novo, in order to have the fact of assent or the contrary found by the jury. The case in error is, therefore, in effect, a decision in support of the law as laid down by this Court in *Christy v. Tancred*.] The letter, coupled with the other evidence in the case, was some proof of the defendant's assent, which the learned Judge was right in submitting to the jury.

*Greenwood*, in support of the rule, was stopped by the Court.

POLLOCK, C. B.—The rule must be absolute for setting aside this verdict, on the ground of its being entirely unwarranted by the evidence. There is nothing at all from which the jury were warranted in inferring that the defendant Crofts was liable to pay for the use of the premises after Lady-day, 1843.

PARKE, B.—I am of the same opinion. This was a verdict without any reasonable evidence to support it. With respect to the letter, it seems to me that Crofts, who stood at that time in the situation of a mere stranger, was not bound to return any answer to the demand for rent. Whether it was strictly admissible or not, it is hardly necessary to say. There was a difference between the late Lord *Abinger* and the other members of the Court on this very point. The Lord Chief Baron thought that a letter such as this was not admissible at all; others, that it was admissible, but not worth anything when admitted.

My own opinion is, that no attention at all need be paid to a letter asking for money which the party does not owe: it is a different case if he is bound by circumstances, or by his situation, to return an answer. I think, therefore, not that such evidence is absolutely inadmissible, but that it is worth very little when admitted. The rule will therefore be absolute, on the ground that the verdict was not supported by the evidence in the case.

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PLATT, B., concurred.

Rule absolute.

The ATTORNEY-GENERAL v. BRIANT.

Jan. 26.

THIS was an information filed by the Attorney-General against the defendant, a paper manufacturer, to recover penalties under the Excise Acts, for sending out paper without entering the true amounts in the book delivered to the Excise, and for removing paper from his mill without proper wrappers, and without its being duly labelled. Plea, Not guilty.

At the trial, before *Pollock*, C. B., at the Middlesex sittings after Michaelmas Term, 1844, a witness who was called on the part of the Crown was asked, in cross-examination, this question, "Did you give the information?" The question was objected to by the counsel for the Crown, and, after argument, was disallowed by the Lord Chief Baron.

In Hilary Term, 1845, *Montagu Chambers*, for the defendant, obtained a rule nisi for a new trial, on the ground that the evidence objected to had been improperly rejected.

The *Attorney-General*, the *Solicitor-General*, *Jervis*, and *J. Wilde* shewed cause in last Michaelmas Term (Nov. 21).

In an information by the Attorney-General for a breach of the revenue laws, a witness for the Crown cannot be asked, in cross-examination, "Did you give the information?"

For the rule of public policy, which protects a witness from being asked such questions as would disclose the informer, if he be a third person, equally applies to questions which would disclose whether the witness is himself the informer.



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—The question which the Court is called upon to decide in this case is one which involves a principle of considerable importance; namely, whether the rule of policy which has long prevailed, and which operates as a protection to the *channels* of communication to the agents of the government, extends also to protect a witness from answering questions, the tendency of which is to elicit that he was himself the *source* of the information given to the government, and on which it has acted in instituting penal proceedings. The manner in which the point was put on moving for this rule was this: that the right which the defendant has to *test the credit* of a witness for the Crown—to ascertain, by inquiry into his motives and actions, whether he is the witness of truth,—is a right which ought to prevail over the right of the government to prevent the discovery of the channels of their information. But the answer to that argument appears to be, that where a rule of evidence, whose object is to protect the public, comes into conflict with one designed for individual benefit or protection only, the latter must give way before the public good. It is clear that the right of a party to a suit, to inquire into the credit of an adverse witness, is not a principle of so ruling and paramount a nature as that every other rule of evidence must bend to it. The case of a confidential communication by a client to his attorney is an instance where it is made subordinate to another principle, which prevails for the public good. And therefore, *à fortiori*, in cases of treason and other state prosecutions, in which the public good is involved far more extensively, the public principle ought, when they come into competition, to prevail over the private one. It is said, however, that the rule of protection in these cases, which is admitted to exist, applies only to protect the *channels* of communication to the government; and so that, although it is conceded that a witness could not be asked whether H. B. gave him the information, A. B. himself may, with the view of discrediting his testimony, be asked

the question, whether *he* gave the information. But the one question is just as much within the prohibition arising from public policy as the other; and if it were not so, the rule would be utterly useless, because each witness in turn might be subjected to the same inquiry, until the informer was at length discovered. *Eyre*, C. J., thus lays down the rule in *Hardy's case* (a): "My apprehension is, that among those questions which are not permitted to be asked, are all those questions which *tend to the discovery* of the channels by whom the disclosure was made to the officers of justice; that it is, upon the general principle of the convenience of public justice, not to be disclosed; that *all persons* in that situation are protected from the discovery." *Buller*, J., adopts the same principle. He says (b), "My Lord Chief Justice and my Lord Chief Baron both say, the principle is, that the discovery is necessary for the purpose of obtaining public justice; and *if you call for the name of the informer* in such cases, no man will make a discovery, and public justice will be defeated." In *Phillipps on Evidence*, Vol. 1, p. 177, (9th edit.), the rule is thus stated: "The discovery of truth in inquiries necessary for the administration of criminal justice, and also where the rights of private individuals are concerned, is an object which, however desirable in itself, may nevertheless be counterbalanced by mischiefs arising from disclosures which would be prejudicial to public interests: hence the danger of such disclosures has been deemed in particular instances an adequate ground for the rejection of evidence. It will not be allowed to examine witnesses in criminal prosecutions as to information given by them to government for the discovery of offenders against the law: the names of persons who are the channels by which detection is made are not to be disclosed. This is not the privilege of the witness, but may be justly called a public privilege, on

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(a) 24 St. Tr. 816.

(b) Id. 818.

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account of its importance to the public. It is observed by courts of justice on a principle of public policy, and from regard to public interests."

. It appears, then, from these authorities, that the communication which the law intends to protect is, *any* communication *by any person*, which, if it became generally known, might expose him to vengeance or to ignominy. The object of the rule, and the terms in which it has been promulgated in the authorities referred to, equally apply to protect the witness who *himself* originally gave the information on which the government has acted. It is obvious that the answer which it was sought to obtain from the witness in this case would have directly disclosed "the channel by whom the disclosure was made to the officers of justice," and would so have defeated altogether the object of the law. To ask a witness, "Are *you* the informer?" is, in effect, to ask *who* is. The invariable course of this Court, in revenue cases, has been to exclude all questions tending to disclose who was the informer. It has become a rule of evidence, established by long practice and tacit consent. The same, in truth, may be said of all which is considered legal evidence on trials before juries. In *Regina v. Ryle (a)*, Lord Abinger, C. B., says, "The notion of legal evidence, on trials before juries, in our law, is the effect of long practice and usage, the decisions of judges, and the practice of *Nisi Prius*, which has grown into a system, and forms part, and a very important part, of the law of the land." And *Parke*, B., says, "The rules of evidence, as applicable to trials between party and party, and criminal trials, have been the result of practice, established, not by the law of the land, but the Judges, seeing that the species of evidence given in cases between party and party, and between the prosecutor and the accused, was much more lax than in the present day, have prescribed certain rules, which have been adhered to."

(a) 9 M. & W. 227.

[*Parke*, B.—In *Watson's case* (a), the question was allowed, “Did you give the information to a magistrate or to a private person?”] That was under peculiar circumstances. The witness was called, and was put forward by the Crown as being in fact the person who had supplied the information: the Crown, therefore, in the first instance, waived the public privilege. Then he was asked this question (b): “Having taken this note on the 2nd of December, to whom did you give the copy, when you had transcribed it from your note?” Answer:—“I gave it to Mr. Beckett” (the Under-Secretary of State). To this there was no objection on the part of the Crown; but Lord *Ellenborough* interposed, and said, “I doubt very much whether these particulars relative to the proceedings of government should be inquired into.” Mr. *Wetherell* than said, “I am aware, that, in *Rex v. Hardy* and *Rex v. Horne*, the Court, on the grounds of public policy, would not permit the name of an informer to be disclosed. No question was made but that the name of a magistrate or accredited person might be asked; and the Court drew a distinction between protecting the name of a third person, and that of a minister or servant of the public.” Upon which *Abbott*, C. J., observed, “Unless I am very much mistaken, the Court held, in *Rex v. Hardy*, that, whether the witness had given information to a member of government, or to some other person, with a view that such person should make the communication to government, in neither case could the witness be compelled to disclose the name of the individual to whom he had given the information.” And Lord *Ellenborough* adds, “There will be no safety in communicating the most important intelligence to government, if such matters are not kept secret, and if the channels of communication are to be revealed. They have hitherto been held sacred; and I see no reason for departing from the rules which have on former occasions

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(a) 32 St. Tr. 98.

(b) Id. 100.

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been adopted." The actual informant may be the only witness; is he then to lose all protection? Suppose he may be asked this question, and he answers it in the negative; and another witness is then called, who is asked, with a view to contradict the former witness, "Did he tell you this?" It is admitted that this is an objectionable question; so that you can neither contradict nor confirm the former witness. Surely, therefore, the question upon which the supposed contradiction is to be founded equally cannot be asked. It was stated at the trial of this cause, that Lord *Eldon*, when Attorney-General, had admitted, in *Hardy's case*, that this question might be put. The passage on which this inference is founded is the following (a):—"In the Court of Exchequer, it unquestionably happens every day, that a witness says, I received an information that there were run goods at such a place; I went there and found them. There it is impossible to deny that *the reasoning is just*, which says that the credit of a witness may be tried by asking him, 'Whom did you receive the information from?—where?—under what circumstances?'" But he proceeds, "And if the man were bound to answer to those questions, and he had spoken falsely with respect to the when and the where he had received it, or under what circumstances, if it rested upon his evidence, when you had falsified it with respect to the preceding particulars, you could not believe him as to the subsequent particulars, and the defendant must be acquitted. Nobody will deny but that it is a hard case; *but it has become a settled rule*, because private mischief gives way to public convenience; and it is a hardship which occurs in particular cases, in consequence of the necessities of public justice." It is obvious, upon the whole of this passage, that Lord *Eldon* never meant to admit that the question might be put; and his words, "the reasoning is just," must be interpreted as meaning "the reasoning *appears to be* just." There

(a) 24 St. Tr. 815.

is no case in which such a question as this has been allowed to be put *after objection*; and if in any case it appears to have been put and answered *without* objection, it was when the Crown itself made the disclosure in the first instance, by putting forward the witness as the avowed informer. It is not disputed, that, *primâ facie*, a question which tends to discredit an adverse witness is admissible; but if it be a violation, either of the confidence between the client and the attorney, or of the rule of public policy, it becomes inadmissible: and the authorities and reasons which have been adduced shew that the rule of public policy applies to this case, and that this question was properly disallowed.

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*Chambers, contra.*—The defendant contends, that, according to the general rules of evidence as established in trials by jury, he was entitled to have this question put, and that no established exception upon those rules exists to prevent it. Reliance has been placed upon the supposed course of practice in this Court. But in a very recent revenue case, the question was asked of a witness, (one Burnby, a Custom-house officer), without objection, whether he was the informer. [*Rolfe, B.*—That was in the case of *Regina v. Candy and Dean*, which was tried before me. The principle was rather followed than violated by asking that question of Burnby; because it was perfectly clear, and admitted, that he was the informer; and it went to exclude the notion of anybody else being an informer.] The very fact of his being “put forward” as the informer goes far to shew that the supposed rule of public policy does not apply; for surely every accused person has a right to the cross-examination of every person who is put forward to depose against him. That right is well stated in Mr. Starkie’s *Treatise on Evidence*, Vol. 1, p. 160, (2nd edit.): “The power and opportunity to cross-examine, it will be recollected, is one of the principal tests which the law has devised for the ascertainment of truth; and this is certainly

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a most efficacious test. By this means, the situation of the witness with respect to the parties and the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discerning facts in the first instance, and his capacity for retaining and describing them, are fully investigated and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing the manner and demeanor of the witness; circumstances which are often of as high importance as the answers themselves. It is not easy for a witness, who is subjected to this test, to impose upon the Court; for, however artful the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross-examination may be extended. The fraud, therefore, is open to detection for want of consistency between that which has been invented, and that which the witness must either represent according to the truth, for want of previous preparation, or misrepresent according to his own immediate invention. In the latter case, the imposition must obviously be very liable to detection; so difficult is it to invent extemporaneously, and with a rapidity equal to that with which a series of questions is proposed in the face of a court of justice, and in the hearing of a listening multitude, a fiction consistent with itself and the other evidence in the case." It is plain, that a person who comes into a court of justice to give evidence, stands in a very different position, so far as regards himself, his character, and his connexion with the circumstances of the case, from a third person *not* put forward as a witness. The accused person is entitled to sift his evidence in every way, and to put to him questions which may be irrelevant to the point in issue, otherwise than as they tend to shew that he is not the witness of truth. Lord *Hale*, in his History of the Common Law, (p. 145), thus remarks upon the excellence of trial by jury: — "The ex-

cellency of this open course of evidence to the jury, in the presence of the judge, jurors, parties, and counsel, and even of the adverse witnesses, appears in these particulars:— First, that it is openly, and not in private before a commissioner or two and a couple of clerks, where oftentimes witnesses will deliver that which they would be ashamed to testify publicly. Secondly, that it is ore tenus personally, and not in writing, wherein oftentimes, yea, too often, a crafty clerk, commissioner, or examiner, will make a witness speak what he truly never meant, by dressing of it up in his own terms, phrases, and expressions; whereas, on the other hand, many times the very manner of a witness's delivering his testimony will give a probable indication whether the witness speaks truly or falsely; and by this means, also, he has opportunity to correct, amend, or explain his testimony upon further questioning with him, which he can never have after a deposition is set down in writing. Thirdly, that, by this course of personal and open examination, there is opportunity for all persons concerned, viz. the judge, or any of the jury, or parties, or their counsel or attornies, to propound occasional questions, which beats and boulds out the truth much better than when the witness only delivers a formal series of his knowledge without being interrogated; and, on the other side, prefatory, limited, and formal interrogatories in writing preclude this way of occasional interrogations, and the best method of searching and sifting out the truth is choked and suppressed. Fourthly, also, by this personal appearance and testimony of witnesses, there is opportunity of confronting the adverse witnesses, of observing the contradiction of witnesses, sometimes of the same side; and by this means great opportunities are gained for the true and clear discovery of the truth. Fifthly, and further, the very quality, courage, age, condition, education, and place of commorance of witnesses, is by this means plainly and evidently set forth to the court and the jury; whereby the judge and the jurors may have a full information of them, and the jurors, as

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they see cause, may give the more or less credit to their testimony; for the jurors are not only judges of the fact, but many times of the truth of evidence; and if there be just cause to disbelieve what a witness swears, they are not bound to give their verdict according to the evidence or testimony of that witness; and they may sometimes give credit to one witness, though opposed by more than one. And, indeed, it is one of the excellencies of this trial, above the trial by witnesses, that although the jury ought to give a great regard to witnesses and their testimony, yet they are not always bound by it, but may, either upon reasonable circumstances inducing a blemish upon their credibility, though otherwise in themselves, in strictness of law, they are to be heard, pronounce a verdict contrary to such testimonies, the truth whereof they have just cause to suspect, and may and do often pronounce their verdict upon one single testimony, which thing the civil law admits of." Not less important doctrines, with respect to the trial by jury, were laid down by *Vaughan*, C. J., in *Bushell's Case* (a). He says, "If the meaning of these words, 'finding against the direction of the Court in a matter of law,' be that, if the Judge, having heard the evidence given in Court (for he knows no other), shall tell the jury upon this evidence the law is for the plaintiff, or for the defendant, and you are, under the pain of fine and imprisonment, to find accordingly, then the jury ought of duty so to do. Every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right or wrong; and therefore the trials by them may be better abolished than continued; which were a strange new-found conclusion, after a trial so celebrated for so many hundreds of years. For, if the Judge, from the evidence, shall by his own judgment first resolve upon any trial what the fact is, and, so knowing the fact, shall then resolve what the law is, and order the jury penally to find accordingly, what either ne-

(a) *Vaugh.* 143.

cessary or convenient use can be fancied of juries, or to continue trials by them at all?" These observations may be applied in the present case to the officers of the Crown; for if the rule contended for on the behalf the Crown is to prevail in all public prosecutions, the trial by jury may as well be dispensed with, and the whole matter determined by a preliminary inquiry on affidavits only, as in the case of *Regina v. Ryle*. It cannot be denied, that a general right exists, that the jury shall see and hear the witness, and determine, from his evidence on all the matters inquired into in the case, how far his testimony is to be relied upon; and that right cannot be set aside but by an overwhelming public benefit, which ought to exclude it. The exceptions which have been introduced as limitations of that general right, rest upon intelligible principles necessary to the due administration of justice. Thus, in the case of attorney and client, it is obvious that justice could not be administered, requiring, as it does, the assistance of attorneys and counsel, unless their professional communications with the client were strictly privileged. So also, with respect to the rule which protects a witness from criminating himself: that rests upon a fundamental principle of our law, which revolts at the idea of a man's being compelled to give evidence to charge himself with crime. But these exceptions are limited to the occasions which require them, for the due administration of justice; and when, as in the *Duchess of Kingston's case* (a), it was attempted to extend the protection, which the law affords to confidential communications to an attorney, to the case of a surgeon, or, as in *Rex v. Gilham* (b), to the case of a clergyman, the courts refused so to enlarge the rule. Nor has the exception, which it is now sought to introduce, been sanctioned by any long course of decisions. The question has never even been discussed in banc; but there are authorities at Nisi Prius in

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(a) 20 St. Tr. 355.

(b) Ry. & M., C. C. R., 198.

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favour of the view taken by the defendant. In *Rex v. Blackman* (a), Lord *Kenyon* allowed a witness to be asked in cross-examination, in effect, the question, "Are you the informer?" in order to establish the fact, that he was an interested witness. [*Pollock*, C. B.—It does not appear that that was a prosecution by a government officer.] In *Rex v. Cole* (b), the same learned Judge ruled, that the fact of a witness being put forward as the informer in the case was one which went to his credit. [*Alderson*, B.—The case before us is not that of a public informer.] He is the informer, in the sense of being the party who gave the information; and none of the cases cited on the other side decide that a witness cannot be asked whether he is the informer. No doubt the question cannot be put with respect to persons who are not before the Court. Public justice does not require the disclosure of the names of third persons; and in such cases, public officers, who are bound to protect the interests of the State, are entitled to the protection which the rule of law throws round them. On a careful examination of the cases which have been referred to, it will be found that they do not sanction the general proposition stated in *Phillipps on Evidence*, and do not support the extended right of inquiry claimed by the officers of the Crown. In *Hardy's case*, this question was put to a witness (c): "How came you to go there?" [to the seditious meetings]. He replied, "I was sent by a gentleman." He was asked, "By whom?" This question was objected to, and *Eyre*, C. J., said, "He has said what is proper and material for the purpose. . . . I do not think it is proper:" and the question objected to was withdrawn. Another witness was afterwards asked, without objection, whether he gave the information to a magistrate; which he answered in the negative. The next question was (d): "Then to whom

(a) 1 Esp. 95.

(b) Id. 169.

(c) 24 St. Tr. 751.

(d) Id. 809.

was it?" This was objected to by the Attorney-General, who said, he could not see what it had to do with the justice of the case. *Eyre*, C. J, said, "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed. If it can be made appear that really and truly it is necessary, for the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it." All, therefore, which was really ruled in that case was, that the names of *third parties* should not be unnecessarily disclosed. Besides, the doctrine there laid down must be taken with reference to the case itself—a trial for treason, the highest crime against the State, in which, for the very safety of the State, disclosures of guilt may be held to be peculiarly privileged. In ordinary criminal cases, nothing is more common than to ask a witness whether he gave information to the police. [*Pollock*, C. B.—In ordinary prosecutions, the name of the Sovereign is used; but it may be used by any prosecutor; and probably the rule does not apply at all in such cases; but there may be reasons of state policy whenever the government is directly concerned, and then the rule applies, whatever be the offence.] And yet it appears that this very supposed public policy is continually set at nought by the Crown itself, when they avowedly "put forward" a witness as the informer, thereby subjecting him to the peril which they suggest as likely to arise, and shewing that there is in fact no such overwhelming public policy as should break in upon the ordinary right of the subject. In *Watson's case*, the witness referred to was not put forward as an informer, but as a witness present at the meeting, as an ordinary short-hand writer might have been; and the inquiry, which was stopped by the Court, was

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as to something which had taken place between him and a member of the government—an inquiry into the *channels* of communication properly so called. The present case, therefore, is opposed to no direct authority, and falls within the general right of an accused person, to cross-examine, as to his own motives and means of knowledge, a witness produced against him. To extend the exceptions to this right further than they have been established by express decision, will greatly limit the means of defence of the accused, and will be in contravention of the general practice both in criminal and civil trials. The inquiry now objected to may be, and in this instance was, of the very essence of the case.

The *Attorney-General*, in reply.—It is quite a mistake to suppose that the privilege insisted on in this case is one peculiarly applicable to trials for high crimes against the State. It had its origin in the course of proceedings in revenue prosecutions in this Court, and was transferred to the other class of cases. In *Home v. Bentinck* (a), *Dallas*, C. J., says, “For reasons of public policy, persons are not to be asked the names of those from whom they receive information as to frauds on the revenue. In all the trials for high treason of late years, the same course has been adopted.” In many cases, of course, it may be altogether immaterial whether the name of the informer be disclosed or not, and the objection may not be taken; but if it is taken, and rested on the ground of public policy, the Judge is to decide whether that principle is applicable or not. And surely the reason of the rule is to protect the communication altogether; and the same policy which applies to prevent the disclosure of the name of a third person, is no less applicable to the case of information given by the witness himself. It cannot make any difference as to the principle, whether you call it the *source* or the *channel*. In the cases cited from *Espinasse*, the

(a) 2 Brod. & B. 162.

witness was put forward as the informer. But in a subsequent case before Lord *Kenyon*, of *Rex v. Akers* (a), which was an information for obstructing a custom-house officer, his Lordship said, "The defendant's counsel have no right, nor shall they be permitted, to inquire the name of the person who gave the information of the smuggled goods." That ruling goes the whole length which is contended for in the present case.

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Cur. adv. vult.

The judgment of the Court was now pronounced by

POLLOCK, C.B.—This was a motion for a new trial, in the case of an information by the Attorney-General against the defendant for a breach of the revenue laws, and the ground of the application for a new trial was the rejection of evidence. A witness called on the part of the Crown was asked, in cross-examination, whether he gave the information. The Attorney-General objected to the question, and, upon argument before me, I decided that the question ought not to be put. If the question should have been allowed, the rule for a new trial ought to be made absolute: if not, the rule ought to be discharged. The case was argued in last Michaelmas Term. On the part of the Crown, *Hardy's case* and *Watson's case* were cited. *Regina v. Ryle* was also cited as an instance where the ordinary rules of evidence did not apply to a revenue case. It was contended, on the part of the Crown, that the rule was general, and that it was founded upon public policy; and that if a question tended to disclose the source of information on which the executive government had acted, it could not be put. For the defendant it was contended, that the right of the subject, to discredit a witness by cross-examination, was universal; and the object of the question being to discredit the witness, that it was

(a) 6 Esp. 125.

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taken out of the rule. Lord *Hale's* History of the Common Law was referred to, and several cases were cited, but none directly in point. In *Hardy's case*, John Groves, a witness for the Crown, being asked by whom he was sent to attend certain meetings, the question was objected to, on the ground, that the channels of information could not be inquired into. The Attorney-General, afterwards Lord *Eldon*, stated, that the Court of Exchequer would not permit the question to be asked. The Court ruled that it was not proper to ask the question, and it was not asked. Subsequently, in the same trial, (page 811), the point arose again; it was on the cross-examination of a witness of the name of George Lynam; this question was put avowedly to try or sift the credit of the witness, namely, who was the person to whom the witness communicated certain facts. Lord Chief Justice *Eyre* held, that although, in ordinary cases, such a question could be put, yet if it involved the disclosure of the channels of communication with the government, it could not be put; and he decided that such was the rule, referring to the question asked of the witness Groves, already mentioned. Lord Chief Baron *Macdonald*, Mr. Baron *Hotham*, Mr. Justice *Buller*, and Mr. Justice *Grose*, all gave judgments, and on all hands it was agreed, that the informer, in the case of a public prosecution, should not be disclosed. All the judges so decided, and the counsel on both sides admitted that such was the law. In *Watson's case*, the same point arose. *Hardy's case* was cited, and Lord *Ellenborough* and Mr. Justice *Abbott*, afterwards Lord *Tenterden*, ruled accordingly. It has been, however, contended for the defendant, that, admitting that a witness cannot be asked who was the informer, the informer being a third person, yet he may be asked whether he was himself the informer, and gave the information. On the part of the Crown it was replied, that such a question, addressed to each witness in turn, might be the means of discovering the informer; and that, if the principle and object of the rule was to prevent the informer

from being discovered, the question cannot any more be put directly to the witness, whether he himself was the informer, than whether a third person was. It was alleged, and, as far as we can learn or have had any experience, it was correctly alleged, that the practice of this Court has been in accordance with this rule. There is no direct authority either way; but the rule clearly established and acted on is this, that, in a public prosecution, a witness cannot be asked such questions as will disclose the informer, if he be a third person. This has been a settled rule for fifty years, and although it may seem hard in a particular case, private mischief must give way to public convenience. This is the ground on which the decision took place in *Hardy's case* and in *Watson's case*; and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer, and therefore that the question could not be asked. The rule must be discharged.

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ALDERSON, B., added :—When the question was before the Court in *Hardy's case*, Lord *Eldon* cited the course of the Exchequer as the authority upon which that rule was laid down; and I find that in Plowden(a) it is laid down, “that if a question arises touching the king’s revenue, or what thing belongs to the king, which brings revenue to him, and what not, and what is the law touching the same and what not, the records of the Exchequer are the most effectual rule as to the law thereon.” Then he gives several instances in which those records have been referred to :—“For the usage in any one court, in a matter whereof it has proper consequence, ought to be affirmed for law in all courts; and the records of such court are patterns whereby the whole realm may know the law in such cases.” Therefore, it having been the usage in the Exchequer to disallow the question objected to, Lord *Eldon* transferred such usage to a criminal court in a similar case.

Rule discharged.

(a) P. 320 a.



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GEEVES v. GORTON.

An arbitrator, to whom a cause is referred with all the powers of a judge at Nisi Prius, cannot give a certificate for the costs of a special jury, after he has made and published his award—without providing for them therein.

A special jury cause, of which the venue was in Middlesex, not having come on for trial at the sittings for which it was set down, the parties signed a consent that the record should be altered by changing the venue to London, and consented thereby to all necessary alterations consequent on such change of venue being made in the record, and that jury process should be issued, &c. as if the cause had been regularly set down for the sittings in London; and that the rule for a special jury should be amended by directing it to the sheriffs of London, and a special jury should be thereupon summoned by the sheriffs of London; and that all the costs of and occasioned by that arrangement should be costs in the cause, and abide the event. The cause came on for trial at the sittings in London, and was then referred to an arbitrator, who decided it in favour of the defendant:—*Held*, that, under the above agreement, the defendant was entitled to the costs of the special jury summoned by him in London, as costs in the cause, without any certificate for a special jury.

**W**EBSTER moved for a rule to shew cause why the Master should not review his taxation of the plaintiff's costs in this cause. The following facts appeared from the affidavits:—The cause was set down for trial as a special jury cause at the Middlesex sittings after last Trinity Term. It did not come on for trial at those sittings, and the parties subsequently consented to a Judge's order to try in London, and a consent was drawn up in the following terms:—"We consent to the record in this cause being altered by changing the venue from Middlesex to London, and to the same being now entered in the London list of causes, with a view to the cause being tried, if possible, during the present sittings in London; and we consent to all necessary alterations consequent on such change of venue being made in the record, and that jury process shall be issued, returned, and annexed to the record, as if the cause had been regularly set down, and the record duly passed for the present sittings in London; and that the rule for a special jury shall be amended, by directing the same to the sheriffs of London instead of to the sheriff of Middlesex; and that a special jury shall be thereupon summoned by the sheriffs of London; and that, in the event of such special jury not being summoned by either party, then the cause shall be tried by a common jury of London, as if no rule for a special jury had been obtained in the action: and until the cause shall be tried, it shall keep its place in the Middlesex cause-list as at present entered; that, in the event of the cause not being tried during the present sittings in

London, the record and jury process shall be altered and re-sealed, so that the cause shall be brought on for trial in Middlesex in due course. And we further consent, that all the costs of and occasioned by this arrangement shall be costs in the cause, and abide the event."

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*Webster.*—The defendant claims these costs on two grounds: first, that they are given to him by the certificate of the arbitrator; secondly, that he is entitled to them under the agreement made between the parties. It is objected, as to the first ground, that the certificate is inoperative, not having been given "immediately after the verdict," within the meaning of the stat. 6 Geo. 4, c. 50, s. 34; but that means no more than that it shall be given within a reasonable time; *Christie v. Richardson* (a); and it can hardly be said that that rule has not been satisfied in this case. [He cited *Waggett v. Shaw* (b), *Page v. Pearce* (c), *Thompson v. Gibson* (d).] And the arbitrator had authority to certify for a special jury, although the time for making his award had elapsed. He did not thereby alter the award. [*Parke, B.*—How could the arbitrator certify for a special jury after he had made and published his award? He must make his award once for all. The defendant might have requested him, before the making of the award, to include in it a certificate for a special jury.] Then, at all events, the defendant is entitled to these costs under the agreement, for they certainly were "costs occasioned by that arrangement," which, by the agreement, were to be costs in the cause, and were to abide the event.

A rule having been granted,

*E. V. Williams* shewed cause in the first instance.—The defendant is not entitled to these costs. The reasonable

(a) 10 M. & W. 688.

(b) 3 Campb. 316.

(c) 8 M. & W. 677.

(d) Id. 281.

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construction of the agreement is, that neither party was to have them unless he obtained a certificate for the special jury. The effect of this arrangement was to place the parties in the same condition as if the cause had been made a remanet by consent. The consequence is, that, in default of a proper certificate, the defendant is not entitled to the costs of the special jury.

POLLOCK, C. B.—I think the rule ought to be absolute. The question turns on the proper construction of this agreement. It is clear, I think, that the defendant did not intend to put in hazard the costs he should incur in pursuance of it, and to make them depend on the certificate of the Judge. The meaning of the parties was, that all the costs were to be costs in the cause, and to abide the event of the cause, not the certificate of the Judge.

PARKE, B.—I am of the same opinion. The meaning of this agreement was, that all the costs which should be occasioned by the change of venue, and by the summoning of the special jury, and otherwise in consequence of the arrangement, were to be determined by the event, that is, the event of the cause. Mr. *Williams's* argument is, that these costs are to be divided, and the costs of the special jury are to abide the event of a certificate for a special jury; whilst all the others, namely, the costs of the change of venue, of altering and re-entering the record, &c., were to abide the event of the cause: but such is not the fair meaning of the agreement.

PLATT, B.—In this case, certain costs had been thrown away; and it was a reasonable agreement, that the further costs to be incurred in consequence should fall upon the losing party.

Rule absolute, without costs.

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## CAINES v. SMITH.

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**ASSUMPSIT.**—The declaration stated, that the defendant promised the plaintiff to marry her; that the plaintiff remained and still is sole and unmarried, and was, during all the time aforesaid, ready to marry the defendant; whereof the defendant always had notice: yet the defendant disregarded his said promise, and afterwards, to wit, on &c., wrongfully and injuriously married a certain other woman.

Plea, that the defendant was not, at any time before the commencement of the suit, requested by the plaintiff to marry her.—Verification.

Special demurrer, on the ground that the plea traversed matter not alleged in or implied by the declaration, and raised an immaterial issue.—Joinder in demurrer.

*Peacock*, in support of the demurrer.—The plaintiff was under no obligation to *request* the defendant to do that which he had put it out of his power to do, by marrying another woman. The point was decided a few days ago by the Court of Queen's Bench, in *Short v. Stone* (a).

The Court called on

*Hawkins*, *contra*.—The plea perhaps cannot be supported; but the declaration is bad in substance. The averment, that the defendant had married another woman, without an allegation of the lapse of a reasonable time for the performance of his agreement with the plaintiff, does not shew a breach of the express promise stated in the declaration. The defendant's wife may die before the lapse of the reasonable time, and he may still be able to perform his con-

Declaration in assumpsit for breach of promise of marriage stated, that the defendant promised the plaintiff to marry her; that the plaintiff remained and still is sole and unmarried, and, during all the time aforesaid, was ready and willing to marry the defendant, of which he always had notice; yet the defendant disregarded his promise, and wrongfully married another woman.

Plea, that the defendant was not, at any time before the commencement of the suit, requested by the plaintiff to marry her :—  
*Held*, first, that the plea was bad on special demurrer; secondly, that the declaration was good on general demurrer, without an averment of the lapse of a reasonable time.

(a) 15 Law J., N. S., Q. B. 143.!

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tract with the plaintiff. The declaration does not even aver that his wife is still alive. "A covenant shall not be broken, if a man does an act which by consequence may be a breach, if the breach does not actually follow:" Com. Dig., "Covenant," (E. 3.)

POLLOCK, C. B.—Our judgment must be for the plaintiff. If a man were under a contract to deliver certain goods to another, and he had put it out of his power to do so by destroying them, it could not be necessary to request him to deliver them. We ought to put a reasonable construction on this declaration, and, doing so, a breach of contract is substantially alleged; and as the defendant has pleaded over, and the question arises as upon general demurrer only, I think the plaintiff is entitled to judgment.

ALDERSON, B.—I am of the same opinion. Why should we presume that the wife will die before the lapse of a reasonable time, or in the lifetime of her husband? We ought rather to presume the continuance of the present state of things; and while that continues, it is clear that the defendant is disabled from performing his contract.

PLATT, B., concurred.

Judgment for the plaintiff.

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## BROWN v. JONES and Others.

**TRESPASS** for assault and false imprisonment.—Plea (in substance), that the defendant Jones recovered against the plaintiff, in the Court of Queen's Bench, the sum of £150 for damages and costs; and that the other defendants, as the attorneys of the defendant Jones, issued a non omittas capias ad satisfaciendum against the plaintiff, directed to the sheriff of Bristol, under which said writ the said sheriff arrested the plaintiff, &c., which are the same trespasses whereof the plaintiff has complained, &c.

Replication, that the said judgment in the plea mentioned was not a judgment signed in any action, but under colour of a certain document purporting to be a warrant of attorney: that, after the issuing of the said writ of non omittas testatum ca. sa., and before the commencement of this suit, to wit, on &c., by a certain order of the Hon. Mr. Baron *Platt*, it was ordered that the said judgment in the plea mentioned, and the said writ of ca. sa., should be set aside, and the same were thereby set aside; which said order was afterwards, to wit, on the 9th day of October, A. D. 1845, ordered to be, and the same was made a rule of this Court: and that the said judgment and writ were so set aside as aforesaid, on the ground that the said document, though purporting to be a warrant of attorney was never delivered to the attorneys named therein as a complete authority to them to do or suffer any of the acts therein specified, but was merely delivered by the plaintiff as an escrow, to take effect in a certain event, which event never happened, and

In trespass for assault and false imprisonment, the defendant justified under a judgment and writ of ca. sa. issued at his suit against the plaintiff.

Replication, that the judgment was not a judgment signed in any action, but under colour of a document purporting to be a warrant of attorney; that, after the issuing of the ca. sa., a judge ordered the judgment and writ to be set aside; that the order was afterwards, to wit, on &c., made a rule of court; and that the judgment and writ were so set aside on the ground that the warrant of attorney was never delivered as a complete authority to do the acts therein specified, but as an escrow, to take effect in a certain event,

which never happened, and was to be kept by the plaintiff in his own possession till such event should happen; and that the defendant, by an improper and fraudulent contrivance, obtained and kept possession of it against the plaintiff's will; that the judgment was signed under colour of the said document, and the ca. sa. issued thereon, without the plaintiff's consent.

*Held*, on demurrer, that the replication was good: 1st, that it was not necessary it should shew that the judgment was set aside for *irregularity*, inasmuch as it sufficiently shewed that it was set aside as having been signed against good faith; 2ndly, that it was not necessary to state that the judge's order was made a rule of court before the commencement of this suit, inasmuch as a judge at chambers had authority to set aside the judgment and writ; and 3rdly, that this was not a case in which the plaintiff ought to have replied nul tiel record.

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was to be kept by the plaintiff in his own possession till such event should happen; and that the defendant, by an improper and fraudulent contrivance, obtained and kept possession of the same without the consent and against the will of the plaintiff: that the said judgment was signed under colour of the said document, and the said writ of *ca. sa.* was issued on such judgment, without the consent of the plaintiff.—Verification.

Special demurrer, and joinder in demurrer.

*Pearson*, in support of the demurrer.—This replication is bad, for it shews on the face of it that the Judge had no authority to make the order for setting aside the judgment. The ground on which he set it aside appears to have been, that the warrant of attorney was an escrow; but the facts stated in the replication shew that it was not, inasmuch as it is stated that it was to be kept by the plaintiff in *his own* possession till the event should happen: Com. Dig., “Fait,” (A. 3). If the replication had shewn that the judgment was set aside for *irregularity*, that would have been an answer to the plea; but as the reasons for the Judge’s order are stated, and they appear on the face of the replication to be erroneous, the order itself cannot be sustained, and the writ and judgment therefore remain in force. It is like the case of an award: if an arbitrator makes an award which is good on the face of it, the Court will not inquire into the grounds of his finding, whether of fact or of law; but it is otherwise if it be shewn, on the face of his award, that he has made a mistake in law. [*Alderson*, B.—In *Prentice v. Harrison* (a), the replication to a similar plea alleged that the writ was set aside by order of a judge, and it was held bad for not alleging that it was set aside for irregularity; for the Court said there were cases in which it might have been set aside as *erroneous*, and in that case the defendants could not be liable. But here that cannot be supposed, because the Court can

(a) 4 Q. B. 852; 1 Dav. & M. 50.

see, on the face of the replication, that the writ was set aside either for irregularity or for want of good faith. *Pollock*, C. B.—The ground seems to have been, that the learned judge thought the judgment was obtained against good faith, and contrary to the agreement of the parties.]

Secondly, the replication is bad, for not shewing that the order was made a rule of Court before the commencement of the suit: *Tucker v. Webster* (a). That is a material and traversable averment, and ought to have been introduced; it was so in *Prentice v. Harrison* and in *Codrington v. Lloyd* (b).

Lastly, the proper course for the plaintiff was to have replied nul tiel record.

*Grey*, contra.—First, it was not necessary, in this case, for the replication to state that the writ was set aside for irregularity; for here it is sufficiently shewn to have been set aside, not for error, but as having been obtained against good faith. *Prentice v. Harrison* is therefore distinguishable; but *Rankin v. De Medina* (c) is in point for the defendants. Secondly, it was unnecessary to state that the order was made a rule of Court; for the judge had authority, by the stats. 1 Will. 4, c. 80, and 1 & 2 Vict. c. 45, to make such an order at chambers. If it were otherwise, a person wrongfully imprisoned under such circumstances might be kept in prison throughout the long vacation. Thirdly, the objection, that the plaintiff ought to have replied nul tiel record, is of no weight: he was only bound to shew that the writ of execution was set aside: *Rankin v. De Medina*. Non constat that there was any record of the ca. sa. [*Alderson*, B.—Suppose the judgment was set aside by consent, on the terms of no action being brought; that would not be within a replication of nul tiel record. *Pollock*, C. B.—

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(a) 10 M. &amp; W. 371.

(b) 8 Ad. &amp; Ell. 449.

(c) 1 C. B. 183.



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There may be cases in which the real question could not be tried upon an issue in nul tiel record.] [He cited *Parsons v. Lloyd* (a), and was then stopped; and

PER CURIAM (b),

Judgment for the plaintiff.

(a) 3 Wils. 341.

(b) *Pollock*, C. B., *Alderson*, B., and *Platt*, B.

Jan. 27.

ABBOTT v. RICHARDS.

A judge's order, made under the 6th section of the Interpleader Act, directed that the goods should be sold by the sheriff, and the money paid into court to abide the event of an issue to be tried between the claimant and the execution creditor. The issue was tried, and a verdict found for the claimant, who thereupon brought an action of trespass against the sheriff, for breaking and entering his dwelling-house, and seizing his goods and converting them to his own use.

IN this case, the defendant, the sheriff of Staffordshire, having taken in execution certain goods under a fieri facias, to which the plaintiff set up a claim, the sheriff applied to a judge at chambers for relief under the Interpleader Act; and an order was made that the goods should be sold, and the proceeds paid into court, to abide the event of an issue between the claimant and the execution creditor. On the trial of the issue, a verdict was found for the claimant, who then commenced this action against the sheriff. The declaration was delivered on the 20th November. It charged the defendant with breaking and entering the plaintiff's dwelling-house, and seizing and taking his goods, and converting them to his own use. On the 28th, the defendant obtained an order for ten days' time to plead; and, on the 8th December, a further order for ten days more. On the 11th of December, a summons was taken out before *Platt*, B., to stay the proceedings, which was referred by the learned Judge to the Court, the plaintiff having till the fifth day of this Term to make the application.

The Court made absolute a rule for striking out so much of the declaration as charged the seizure and conversion of the goods.

And *semble*, (per *Alderson*, B., and *Rolfe*, B.), the proceedings ought in such a case to be stayed altogether.

In the commencement of this Term, *Gray* accordingly moved for a rule to shew cause why the proceedings in the action should not be stayed: the Court, however, only granted him a rule to shew cause why so much of the declaration as charged the defendant with seizing and taking the plaintiff's goods, and converting them to his own use, should not be struck out. Against this rule

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*Humfrey* and *Hance* now shewed cause.—First, this application is too late. It has universally been laid down, that the sheriff must come to the Court promptly for relief of any kind; and here he has taken steps in the cause which have put the plaintiff to expense, and occasioned delay. [*Pollock*, C. B.—This is not a question of irregularity: it is never too late to stay proceedings, where manifest injustice would be done by letting them go on. Besides, where the sheriff obtains an order under the Interpleader Act, the Court may give effect to it any time. *Alderson*, B.—The only question is, whether the Court ought to allow the plaintiff to go against the sheriff for the acts which were done by him under the interpleader rule.] The Judge not having, by his order, restrained the plaintiff from bringing an action, the Court will not now stay the proceedings. The Court can exercise their jurisdiction under the act, only where an adverse claim is made: if, therefore, they hold that the plaintiff ought to be thus limited, the consequence will be, that the party will always lie by and bring an action. There may have been special damage arising from the mere act of seizure, or the goods may have sold for much less than their value.

*Gray*, contra, was not called upon.

*POLLOCK*, C. B.—I think the rule ought to be made absolute on payment of costs. I find no suggestion in the affidavits of any special damage; and the supposed hardship on the party, of having his goods seized, and sold, perhaps,

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for less than their value, and receiving only the proceeds of the sale, is a matter which might and ought to be brought before the Judge at the time of the making of the order. Here, nothing of that nature appears to have been stated to him. There may, perhaps, be some doubt as to the extent of the Judge's authority under the act: my impression is, that he has a right to do all that is just, proper, and equitable under the circumstances. Here we must presume that he did so. It would therefore be very unjust to make the sheriff responsible for what he did under the order of the Judge. There is nothing in the affidavits to shew that any question was intended to be raised before him, except the title to the goods. I think, however, we cannot protect the sheriff as to the trespass charged by breaking and entering the house; but, the goods having been sold under the authority and direction of the Judge, and the plaintiff having already received the proceeds of the sale, which we must suppose to be the value of them, it would be an opprobrium to the law to allow him then to bring an action for supposed special damage, and get damages over again for so disposing of them.

ALDERSON, B.—I am of the same opinion. The Interpleader Act begins by providing, in the 1st section, for the mode of relief for ordinary persons who desire to interplead. In these cases, the party comes into Court, and states an affidavit that he claims no interest in the subject-matter of the action, and “is ready to bring into Court, or to pay or dispose of, the subject-matter of the action, in such manner as the Court or any judge thereof may order and direct;” and upon that the Court or the judge is to make such order therein, as to costs and all other matters, as may appear to be just and reasonable. Then the 6th section points out what is to be done in the case of sheriffs—namely, the same thing: the Court may, upon application of the sheriff, “exercise, for the adjustment of such claims,

and the relief and protection of the sheriff, *all or any of the powers and authorities hereinbefore contained*, according to the circumstances of the case." The Court or judge, therefore, has a jurisdiction over the subject-matter brought into Court, which in this case consisted of the goods seized, and has power to dispose of them in such manner as, according to all the circumstances of the case, shall appear to be just and reasonable. The sheriff holds them at the discretion of the Court or judge, who is to make such order with respect to them as he shall think just and reasonable. Then, when the Court or the judge, having a discretion so to do, orders the sheriff to sell the goods, it would be monstrous if he were afterwards to be held responsible in an action for selling them under that order. It would be doing a grievous injustice to the officer of the Court; and that is all that we now intend to prohibit the plaintiff from doing. If any special damage was really sustained by the seizure and sale, that should have been brought under the notice of the learned Judge at the time.

ROLFE, B.—I am of the same opinion. My only doubt is, whether the rule goes far enough; for I doubt whether the Legislature intended that there should be any interpleader at all, except where the interpleader disposes of everything: and if the Judge sees that there really is a question which will not be disposed of by determining the title to the goods, I think he should not interfere at all. There is no analogy for allowing the party to split his claim into two parts;—first, the title to the goods, and secondly, a claim for damages: therefore I should say, that, in such a case, the Judge has no jurisdiction under the statute; and there is no absurdity in that. The Legislature meant to protect the sheriff as far as they could; and there is no absurdity in saying that there may be cases of adverse claims to which the act does not apply, and over which the Judge cannot adjudicate. But that, after an interpleader rule

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has been disposed of, and an order made, and an issue tried, the party should be allowed to have another action against the sheriff in respect of his seizure of the same goods, would be monstrous. I have therefore no difficulty in concurring to the extent of this rule; the only objection with me is, that it does not go far enough.

ALDERSON, B.—I must say I concur with my Brother *Rolfe*, and think the rule does not go far enough.

Rule absolute.



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PROUDFOOT and Another v. BOYLE.

Three causes were referred to arbitration, in one of which the infant sued by his next friend; the other two being actions in which he was the substantial, though not the nominal plaintiff. The costs of the causes were to abide the event, and the costs of the reference and award were to be in the discretion of the arbitrator. The arbitrator decided all the causes in favour of the defendant, and ordered that the infant should pay all the costs of the reference and award:—*Held*, that this was no excess of authority.

THIS was an action of covenant on a deed of apprenticeship, and, upon its coming on for trial, it was referred by order of *Nisi Prius*, together with two other actions against the same defendant, in one of which the apprentice, an infant, sued by his mother and next friend. The infant was a party to two of the actions, but not to the third; but he was the substantial plaintiff in all. The costs of the causes were, by the order, to abide the event of the award, and the costs of the reference and award were to be in the discretion of the arbitrator, who was to certify by and to whom the same should be paid. There was also a clause empowering the Court to remit the matter back to the arbitrator, in case of any invalidity in the award. The arbitrator, by his award, ordered that a verdict should be entered in this cause for the defendant; that the other two actions should cease, and be no further prosecuted; and that the infant should pay the costs of the reference and award.

*Held*, that this was no excess of authority.

*Humfrey* had obtained a rule to shew cause why this award should not be set aside, on the grounds, first, that the arbitrator had exceeded his authority, in ordering an infant to pay costs; and secondly, that the award was not final, inasmuch as the costs of the whole reference were ordered to be paid by a person who was not a party to all the causes referred.

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*Lush* now shewed cause.—It is no ground of objection to this award, that the party against whom it is made is an infant. A submission to arbitration by an infant is, no doubt, *voidable*; that is, he *may*, if he choose, set it aside, until ratification by him after full age. But here he does not apply to set aside the award on that ground, but only says that it was an excess of authority to order him to pay costs. He therefore admits himself to be a competent party to the reference; and, being so, the arbitrator clearly had authority over him in respect to the costs.

Secondly, there is nothing to limit the power of the arbitrator over any of the parties to the reference, in respect of the several causes. He may select any of the parties he pleases for this purpose; and he has selected the party who was the substantial plaintiff in all the actions. Surely all the parties to this submission might agree that any one of them should be made to pay the costs of all. [*Pollock*, C. B.—If the arbitrator thought the whole of the proceedings were substantially his, he might well throw upon him the costs of the whole reference.] It will be said there is no sufficient finding on this point, because the arbitrator makes the costs payable by a party against whom they cannot be enforced. But *he* cannot complain of that; it is to the defendant's loss, if at all. The infant's proper time for objecting as to this matter, is when the defendant seeks to enforce the costs against him.

*Humfrey*, *contra*.—The submission must receive a rea-

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sonable construction, namely, that the costs of the reference are to be in the discretion of the arbitrator *as to each cause*, as if each had been referred separately. [Pollock, C. B.—Why then are all the actions blended together in one reference? Suppose the two actions to which the infant is a party to have been improperly brought by his mother and uncle in his name, why should not the arbitrator make *them* pay all the costs of all the actions? Alderson, B.—The costs of the reference and award must be one joint matter: “the costs of the reference” means the costs of the whole matter referred; and all the parties are to be subject to the arbitrator’s discretion as to them. If we are to say that the costs of the reference of cause A. are to be paid by B., of cause C. by D., and so on, how is the Master to ascertain them?] The arbitrator should ascertain the whole amount himself, and order certain proportions, at his discretion, to be paid by each. [Alderson, B.—It is impossible he can ascertain the proportions accurately.]

Secondly, the order for payment of costs by the infant is altogether inoperative. There is no power to enforce it: he may relieve himself from them at any time. [Alderson, B.—Let him do so; but why should we set the award aside for that?] The arbitrator has directed a person to pay who is not liable to pay, and who may at any time revoke the submission. If he had not so directed, how can it be certainly said, that he would not have ordered the other plaintiffs to pay these costs? The award, therefore, is not final, by reason of the costs being ordered so to be paid, for the arbitrator has, in effect, not adjudicated by whom the costs shall be paid at all events, by parties bound to pay them. It is as if he had ordered them to be paid by a stranger.

POLLOCK, C. B.—On the face of the award, it is perfectly good; and, at all events, we ought not to interfere to set it aside on this ground. If we had any doubt, we should

send it back to the arbitrator to be amended; but I think it is right in all respects.

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ALDERSON, B., and ROLFE, B., concurred.

Rule discharged, with costs.



PIERPOINT v. BREWER.

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THIS cause having been removed into this Court by certiorari from the Lord Mayor's Court,

Shares in a railway company in actual operation are property in respect of which bail may justify.

*J. Henderson* appeared to justify bail under the recognizance. The qualification of one of the bail consisted of shares in certain railway companies in actual operation under their acts of Parliament.

*Morris* objected to the bail, urging that railway shares were, at best, but a fluctuating property, which might prove to be of no value at all.

ALDERSON, B.—Surely they are property. Money itself is of a fluctuating nature, as shifting from one person to another.

PER CURIAM,

Bail allowed.



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## VACATION SITTINGS AFTER HILARY TERM.

Feb. 6.

LEONARD v. BAKER.

Under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, s. 75, the prisoner is discharged only as to the particular debts and sums of money mentioned in his schedule to be due from him to the creditors named therein, and not generally as to all his debts then due to such creditors.

**ASSUMPSIT** by payee against maker of two several promissory notes; the first for £76, dated 26th August, 1839, payable two months after date: the second for £50, dated 7th March, 1840, payable two months after date.

The defendant pleaded (*inter alia*), that, after the making of the promises, &c., and before the commencement of this suit, to wit, on the 14th of November, 1840, by a certain order and adjudication of the Court for the Relief of Insolvent Debtors, he, the defendant, then being an insolvent debtor, and in prison, was, according to a certain act of Parliament, &c., [1 & 2 Vict. c. 110], ordered to be discharged from custody, and declared to be entitled to the benefit of the said act, as to the several debts and sums of money due or claimed to be due from the defendant on the 15th day of September, A. D. 1840, being the time of making the order vesting the estate and effects of the defendant, &c., to the several persons named in his schedule as creditors, including the plaintiff: that the several debts and sums of money in the declaration mentioned were due from the defendant to the plaintiff before and on the said 15th day of September, 1840; and that the plaintiff, at the time of the said adjudication, was, and still is, one of the persons named in the defendant's said schedule as a creditor of the defendant; and that he, the defendant, was duly discharged according to the said order and adjudication, and thereby became entitled to the benefit of the said act, &c.—  
Verification.

Replication, that the defendant was not by the said order and adjudication adjudged or ordered to be discharged, according to the said statute, as to the said several debts and sums of money in the said plea mentioned, &c. : and issue thereon.

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At the trial, before *Erle*, J., at the last assizes at Bristol, it appeared that the defendant had inserted the name of the plaintiff in his schedule filed by him in the Insolvent Debtors Court, as a creditor for "two sums of £100 and £106;" but the schedule made no mention of the promissory notes on which this action was brought. The learned Judge thought that the defendant was not, under these circumstances, discharged from liability as to the two promissory notes, and directed a verdict for the plaintiff as to the two first counts of the declaration, reserving leave to the defendant to move to enter the verdict thereon for him.

In last Michaelmas Term, *Kinglake*, Serjt., moved pursuant to the leave reserved, and obtained a rule to shew cause; against which,

*Barstow* (with whom was *Crowder*) now shewed cause. —In this case the verdict has been found for the plaintiff for a totally *distinct and separate debt* from that named in the defendant's schedule in connection with the plaintiff as a creditor; and it is submitted that the defendant was not, by his discharge under the Insolvent Debtors Act under such circumstances, discharged from liability as to the cause of action arising upon these promissory notes. There appears to be some difference upon this point between the decisions of this Court and of the Court of Common Pleas. In the case of *Tyers v. Stunt* (a), the latter Court ex-

(a) 7 Scott, 349.

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Feb. 11.

## WILDERS and Others v. STEVENS.

Assumpsit by indorsees against indorser of a bill of exchange, drawn by W. & Co. on H., indorsed by W. & Co. to the defendant, and by the defendant to the plaintiff.

Plea, that W. & Co. are the plaintiffs, and no other persons; that the plaintiffs and no other persons are the makers of the bill, and the persons to whose order it was payable, and the persons who indorsed to the defendant, and who are liable to him as such indorsers, in the event of payment of the bill by him.

Replication, that, at the time of the drawing of the bill, H. was indebted to the plaintiffs in the amount of the bill, and thereupon it was

agreed between the plaintiffs and H., that, in consideration that H. would procure the defendant to indorse and become surety as indorsee to the plaintiffs of the bill, they would give time to H. for payment of the debt: that the plaintiffs, in pursuance of this agreement, drew and indorsed the bill as in the declaration mentioned, and the defendant, for the accommodation of H., indorsed it to the plaintiffs, with the intent of thereby becoming surety as indorser to the plaintiffs of the bill; that H., in further pursuance of the agreement, delivered the bill so indorsed to the plaintiffs, and the plaintiffs gave time to H., and that no part of the said debt has been paid to them:—*Held*, first, that the facts disclosed in the replication shewed a sufficient title in the plaintiffs to sue the defendant on his indorsement to them, notwithstanding their previous indorsement to him. Secondly, that the replication shewed a sufficient consideration for the defendant's promise to pay the plaintiffs the amount of the bill. And thirdly, that it was not a departure from the declaration.

**A**SSUMPSIT by the indorsees against the indorser of a bill of exchange. The declaration stated, that T. & H. Wilders & Co., on &c., made their bill of exchange for 40*l.* 12*s.*, payable to their order, and directed the same to one J. Heigham, &c.; that Wilders & Co. indorsed the same to defendant, and the defendant then indorsed the same to the plaintiffs. The declaration then averred presentment to and nonpayment by Heigham, in the usual terms.

Plea, that the said T. & H. Wilders & Co. are the plaintiffs, and no other persons; that the plaintiffs and no other persons are the makers of the said bill and the persons to whose order the same was payable, and the persons who indorsed the same to the defendant, and who are liable to the defendant as such indorsers, in the event of payment of the same by him.—*Verification*.

Replication, that, before and at the time of the drawing and making of the said bill by the plaintiffs, and the indorsement thereof by the defendant, as in the declaration mentioned, Heigham was indebted to the plaintiffs in the sum of 40*l.* 12*s.*, and thereupon it was agreed between the plaintiffs and Heigham, that, in consideration that Heigham would procure the defendant to indorse, and become surety as indorser to the plaintiffs of the said bill, the plaintiffs should give time to Heigham for the payment of the said debt of 40*l.* 12*s.*; that the plaintiffs, thereupon afterwards,

in pursuance and performance of the said agreement, drew and indorsed the said bill as in the declaration mentioned, and that the defendant, for the accommodation of Heigham, indorsed the same to the plaintiffs, with the intent of thereby becoming surety as indorser to the plaintiffs of the said bill. That Heigham, after the said indorsement by the defendant, in further performance of the said agreement, drew the said bill so indorsed by the defendant to the plaintiffs; that the plaintiffs, in performance of the said agreement, gave time to Heigham for payment of the said debt, and that no part thereof has been paid to the plaintiffs.—Verification.

Special demurrer, assigning for causes, that the replication admits the indorsement by the plaintiffs to the defendant, as in the plea mentioned, and that the plaintiffs were liable to the defendant thereon, and their promise thereby to pay him the amount of the bill, if the drawee did not: and that it is inconsistent with such promise and indorsement of the plaintiffs, and is a circuitry of action, for the defendant to be liable to them upon his indorsement, though made under the circumstances stated in the replication; and that, as the defendant is not by the replication alleged to have been a party to the agreement between the plaintiffs and Higham, such agreement could form no consideration for the defendant's indorsement to the plaintiffs.—Joinder in demurrer.

*Petersdorff*, in support of the demurrer.—This replication is no answer to the plea. A party who has indorsed a bill of exchange to another, and has become liable as such indorser, cannot, on having the bill re-indorsed to him by the other, bring an action against him on such indorsement. The reason of this rule is thus stated in *Byles on Bills of Exchange*, p. 114:—"If a bill be re-indorsed to a previous indorser, he has no remedy against the intermediate parties, for they would have their remedy over against him, and the

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result of the actions would be to place the parties in precisely the same situation as before any action at all." On this ground it was held, that, where C. made a promissory note to A., who indorsed it to B., by whom it was re-indorsed to A., A. could not recover on the note against B.: *Bishop v. Hayward* (a). [*Parke, B.*—Lord *Kenyon* there says that there might be circumstances, which, if disclosed on the record, might entitle the plaintiff to recover; the question is, whether the replication here does not disclose such circumstances.] Admitting, however, that the defendant might be liable upon a declaration properly framed, this replication is bad for departure; for it does not support the declaration, but introduces facts inconsistent with it. Further, the facts stated in the replication shew no sufficient consideration for the defendant's promise; for no consideration is shewn to have existed between the defendant and Heigham, to whose agreement with the plaintiff the defendant is not alleged to have been a party. The objection arising from the circuitry of action, therefore, remains, and prevents the plaintiffs from recovering on the bill against the defendants by reason of his indorsement to them.

*Barstow, contra.*—The objection arising from the circuitry of action is removed by the facts disclosed in the replication, which rebut the presumption raised by the plea as to the defendant having a counter right of action against the plaintiffs; the defendant may, under the circumstances stated on these pleadings, be treated as a new drawer of the bill: *Penny v. Innes* (b); and if he were to sue the plaintiffs upon the bill, the facts stated in the replication would be an answer to the action. In Mr. Justice Story's book on Promissory Notes, pp. 479, 598, the principle is stated, that the acts of parties to negotiable instruments ought to be so interpreted as to carry their intentions into effect.

(a) 4 T. R. 470.

(b) 1 C., M., & R. 439.

Again, as to the supposed want of consideration, *Ridout v. Bristow* (a) is an authority to shew that a promissory note is binding, although it purports on the face of it to be given for the debt of another. The facts here alleged bring the case within the same principle. Nor is the objection as to the supposed departure of any weight; for the replication supports the declaration, by shewing facts which entitle the plaintiffs to sue the defendant upon the bill, notwithstanding their previous indorsement to him. Besides, this objection is not pointed out by the demurrer. [He was then stopped.]

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PARKE, B.—I think Mr. *Barstow* has given a satisfactory answer to the objections taken in this case on behalf of the defendant. If the replication is a departure from the declaration, that ought to have been pointed out as a cause of special demurrer. With respect to the main objection, although the old authorities are in some degree to the contrary, the modern decisions have settled the law in conformity with the view taken on behalf of the plaintiffs. The declaration shews a title to sue the defendant upon his indorsement; and the replication states circumstances sufficient to negative any right in him to sue the plaintiffs upon their indorsement to him. Then there is a sufficient statement of consideration; for the agreement of the plaintiff to give time to Heigham is a sufficient consideration for the defendant's promise to pay the note, by way of guarantee for him. The objection, therefore, as to the circuitry of action being removed, inasmuch as the defendant could not sue the plaintiffs, the case is brought within those special circumstances, which it was said by the Court, in *Bishop v. Hayward*, may exist, and which entitle the plaintiffs to recover against the defendant. Upon this state of the pleadings, therefore, it seems to me that the plaintiffs are entitled to our judgment.

(a) 1 C. & J. 231.

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ALDERSON, B.—I am of the same opinion. The replication negatives the objection founded on circuitry of action, which is the only objection to the plaintiff's right to recover in this action.

ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiffs.

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TURNER v. FORD.

The plaintiff lent a piano-forte to W., in whose hands it was seized under a distress for rent. While the landlord's bailiff remained in possession by W.'s consent, a fieri facias against W., at the suit of another creditor, was put into the premises, and the officer seized the piano-forte, and removed it to the premises of the defendant, an auctioneer, for sale:—*Held*, that the plaintiff (after demand and refusal to deliver it) was entitled to recover it from the defendant in trover.

TROVER for a piano-forte.—Pleas: not guilty, and not possessed; on which issues were joined.

At the trial, before *Rolfe*, B., at the sittings in Middlesex in Hilary Term, the following facts appeared in evidence:—The piano-forte in question was the plaintiff's property, and was lent by him to a person of the name of Wyon, in whose possession, in September 1845, it was seized by his landlord under a distress for rent. The landlord remained in possession of the goods, with Wyon's consent, till the 15th of October; on that day an execution was put into the premises at the suit of one Linton, under which the officer seized the piano-forte, and removed it to the premises of the defendant, an auctioneer, for sale; and the defendant afterwards refused to deliver it to the plaintiff, and sold it under the directions of the sheriff's officer.

Upon these facts, it was contended at the trial, on behalf of the defendant, that the plaintiff had no right of action; for that the chattel being, at the time of the alleged conversion, in the custody of the law, the right of possession was then in the landlord, and not of the plaintiff, and the former only could sue for it in trover. The learned Judge reserved the point, and directed a verdict

for the plaintiff, giving leave to the defendant to move to enter a nonsuit.

*F. V. Lee* having obtained a rule accordingly,

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*Humfrey* and *J. Brown* now shewed cause.—The plaintiff is entitled to recover in this action; for his property in the piano was not divested by the distress, at least not so as to prevent his maintaining an action of trover against the defendant, who is a mere stranger. It will be said, that if this action can be maintained, the defendant will be twice vexed, because he would be liable to another action at the suit of the landlord; but that is not so. [*Parke*, B.—The landlord's remedy is by an action against the sheriff's officer for pound-breach.] In *Rex v. Cotton* (a), the law on this subject is thus stated: "The distrainer neither gains a general nor a special *property*, nor even the possession in the cattle or things distrained. He cannot maintain trover or trespass; for they are in the custody of the law by the act of the distrainer, and not by the act of the party distrained upon." In Selwyn's *Nisi Prius*, 1384, (9th edit.), a case is cited (b), *Moneux v. Goreham*, in which *Probyn*, C. B., is said to have ruled, that a landlord who has distrained goods cannot maintain trover for them. *Wilbraham v. Snow* (c) is an authority to the same effect. [*Parke*, B.—You say the plaintiff retains his right of *property* in the goods, although they are in the custody of the law; and that, as soon as they come out of that custody, he may maintain trover for them, and the defendant has no defence on the ground that, at a prior time, they were in the custody of the law.] Yes. A *sheriff*, no doubt, may maintain trover against such as take chattels out of his possession; but the same reason does not apply to the case of a landlord, who is not, like the sheriff, answerable to the owner of the chattels if they escape, or

(a) *Parker*, 121.

(b) From Serjeant Hill's MSS.

(c) 2 *Saund.* 47 a.



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are wrongfully taken from him: *Vaspor v. Edwards* (a). The only remedy for the landlord is by an action against the sheriff's officer for pound-breach. But, further, here the custody of the law was completely at an end before the conversion by the defendant: *Knowles v. Blake* (b), *Rich v. Woolley* (c).—The following authorities were also referred to in the course of the argument: *Giles v. Grover* (d), *Whitley v. Roberts* (e), *Williams v. Price* (f), *Wilson v. Barker* (g), *Wilson v. Tummon* (h).

*F. V. Lee*, contra.—The real question in this case is, whether a party who distrains goods for rent can, during the time that he is entitled to hold them, maintain trover against a party who converts them. The landlord in this case had at least a lien on this chattel, and a right of possession, together with a power of sale, the five days having elapsed within which there could be a replevin. Now, if he could sue in trover, the plaintiff could not; for there could not be two concurrent rights of property in the same chattel in both of them. It must however be admitted, that the case cited from Selw. N. P., and that of *Rex v. Cotton*, appear to be at variance with this view of the case, and, if they are held to be law, seem to be decisive of the point.

PARKE, B.—I am of opinion that the plaintiff is entitled to maintain this action of trover. The conversion in this case took place after the custody of the law was at an end, and at a period when the right of property was certainly in the plaintiff. The present defendant was no party to the

(a) 12 Mod. 658.

(b) 5 Bing. 501.

(c) 7 Bing. 651.

(d) 9 Bing. 128; 1 M. &amp; Scott, 197; 1 Cl. &amp; Fin. 72; 1 Bli. (N. S.) 277.

(e) M'Clcl. &amp; Y. 107.

(f) 3 B. &amp; Adol. 695.

(g) 4 B. &amp; Adol. 614.

(h) 6 Man. &amp; G. 236; 6 Scott, N. R., 894.

pound-breach, and the case, therefore, stands clear of the question, whether an action of trover lies against the defendant for an act for which the distrainer could also have brought an action against him. It is unnecessary, therefore, to consider that question on the present occasion: but I am inclined to think, that, if the act of conversion had amounted to pound-breach, the defendant would have been liable in damages to the landlord, and also to the owner of the property for damages for the conversion. It might be difficult in such a case to ascertain the damages; but they would not exceed, in the whole, the value of the chattels distrained. It is unnecessary, however, to give any opinion upon this point, because here the conversion took place after the landlord's right of action, whatever it was, had ceased, no fresh pursuit having been made.

ALDERSON, B.—I am of the same opinion. Where goods that have been distrained are in the possession of a third party, under such circumstances that the landlord cannot recover them, the right of possession attaches to the right of property, and the real owner may maintain trover for them.

ROLFE, B., concurred.

PLATT, B.—In this case it is clear that the impounding was at an end; the landlord might have an action for pound-breach against the sheriff's officer, but his remedy to recover the goods was gone. Then how can the defendant justify his possession of them as against the plaintiff?—quo jure?—that of the landlord, or the sheriff? Certainly not of the landlord, for he was not his bailiff; nor of the sheriff, because the sheriff cannot take one man's goods for another man. The property, and the right of possession, were both in the plaintiff, and he is therefore entitled to recover in this action.

Rule discharged.

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Feb. 21.

LOAD and Another v. GREEN and Others, Assignees of  
BANNISTER, a Bankrupt.

A. bought goods from B. with the fraudulent intention of never paying for them, and kept them until his bankruptcy:—*Held*, that they did not pass to A.'s assignees under the fiat, as having been in his possession, order, and disposition as the reputed owner thereof, *with the consent of the true owner.*

**TROVER** for handkerchiefs, silk, muslin, &c.—Pleas: first, not guilty; secondly, a denial of the plaintiffs' property in the goods. At the trial, before *Pollock*, C. B., at the London Sittings after last Trinity Term, it appeared that the goods in question were bought by the bankrupt, Bannister, on the 1st of July, 1845, from the plaintiffs, and the jury found that he bought them with the fraudulent intention of not paying for them. They were delivered to him on the 4th of July; and on a subsequent day, while they were still on his premises, they were taken possession of by the defendants, who were his assignees under a fiat in bankruptcy issued on the 8th of July (a). It was contended for the plaintiffs, that, under these circumstances, the assignees acquired no property in the goods: for the defendants it was insisted, that they were in the order and disposition of the bankrupt, and therefore passed to them as his assignees. A verdict was entered for the plaintiffs, damages 107*l.* 6*s.* 6*d.*, leave being reserved to the defendants to move to enter a nonsuit, or a verdict for them. In last Michaelmas Term, *Humfrey* obtained a rule accordingly; against which

*Martin* and *Wordsworth* shewed cause in Hilary Term (Jan 14).—The question in this case is, whether, where goods are fraudulently obtained by a party under a pretended contract of sale, and remain in his possession down to his bankruptcy, they are to be considered as being in his

(a) The precise date of the act of bankruptcy did not appear in evidence at the trial. It was assumed on the argument, that it was subsequent to the sale and

delivery of the goods to Bannister; but it was then stated that in fact it took place on the 23rd of June.

“possession, order, or disposition, *by the consent and permission of the true owner*,” within the meaning of the 72nd section of the Bankrupt Act, 6 Geo. 4, c. 16. Before this section can apply, there must be a real owner of the goods, who permits the bankrupt to have the possession of them, *knowing himself to be the real owner*. Here the plaintiffs were at liberty to affirm or disaffirm the sale to Bannister, at their option, by reason of the fraud; and it was not until they elected to treat the contract as void, that they could, properly speaking, be said to be the real owners of the goods. There was no *true* owner and *apparent* owner within the meaning of the statute until after the bankruptcy, when the vendors intervened, and sought to avoid the contract. But, even if this view of the case be incorrect, it is obvious that there could be no *consent and permission* to the bankrupt being the reputed owner; for consent must mean consent *with knowledge* of all the circumstances—knowledge that the party consenting is the real owner; and that cannot apply to a case where the transaction is fraudulent altogether on the part of the buyer. Could Bannister have pleaded leave and license to an action of trover by the plaintiffs? Clearly not. [Platt, B.—It is a penalty upon the consenting party.] Yes; upon him who enables the other to obtain a false credit by means of the possession of the goods. [Alderson, B.—How can a man *permit*, who does not know that he has *a right to refuse*? He supposes he has parted with the property in the goods: if he has, he has no right to refuse the possession; therefore the supposed consent is under circumstances in which, if they were true, he had no right to refuse.] The only consent, in truth, was to the bankrupt’s holding the goods *as real owner*.

The cases of *Miller v. De Metz* (a), *Ex parte Carlow* (b), *Earl of Bristol v. Wilsmore* (c), and *Ferguson v. Carrington*

(a) 1 M. &amp; Rob. 479.

(b) 2 Mont. &amp; Ayr. 39.

(c) 1 B. &amp; C. 514.

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*tan* (a), are authorities for the plaintiffs. [*Parke*, B., referred to *Noble v. Adams* (b).] There it is distinctly laid down, that a sale of goods obtained by fraud cannot change the property. The case of *Milward v. Forbes* (c), which may be cited on the other side, proceeded on the ground that the *property* in the goods was changed. The same observation applies to *Haswell v. Hunt* (d). In *Sinclair v. Stevenson* (e), fraud was expressly negatived by the jury: there are, however, expressions in the judgment of *Best*, C. J., in that case, which appear to go to the extent that, even if fraud had been proved, the goods would be in the order and disposition of the buyer, and pass to his assignees on his bankruptcy, within the stat. 21 Jac. 1: but those dicta cannot be supported consistently with the other authorities.

*Humfrey and Aspland*, contra.—This case is within the 72nd section. All the terms of that enactment are satisfied by the facts which appear in this case. The bankrupt, at the time of his bankruptcy, clearly had the goods in his possession, order, and disposition, as reputed owner; the plaintiffs were the true owners, the sale being altogether void by reason of the fraud; and there can be no doubt as to the fact of their consent to the *possession* of the goods by the bankrupt, which is all the statute requires. It says nothing about consent to the *means whereby the possession was obtained*. Any other construction would do violence to the language of the act. Everything whereby the trader obtained fictitious credit, is meant to be within the power of disposition of the assignees. The consent is not necessary to the *reputed ownership*, but only to the *possession*. No question of *property* arises: it is enough if there be a consent to the

(a) 9 B. &amp; C. 59.

(b) 7 Taunt. 54.

(c) 4 Esp. 171.

(d) Cited 5 T. R. 231.

(e) 2 Bing. 514; 10 Moore, 46.

goods being in fact, manually, in the possession, order, and disposition of the bankrupt at the time of the bankruptcy. It may be observed, moreover, that mere fraud, not amounting to felony, does not for all purposes vitiate the transaction. In *Parker v. Patrick* (a), it was held, that where goods are obtained by fraud, and pawned to a third party, without notice, and the original owner prosecutes the fraudulent person to conviction, and gets possession of the goods, the pawnee may recover them back in trover: and a distinction was taken between a case of fraud and that of felony, in which, by the stat. 21 Hen. 8, c. 11, the owner of the thing stolen, in case he prosecuted the offender to conviction, was entitled to restitution. The ruling in the case of *Shepard v. Shoolbred* (b) seems to go as far as *Parker v. Patrick*. [*Parke, B.*—The case of *Parker v. Patrick* has been doubted; but I think it may be supported on the ground, that the transaction is not absolutely void, except at the option of the seller: he may elect to treat it as a contract, and he must do the contrary before the buyer has acted as if it were such, and resold the goods to a third party. *Wright v. Lawes* (c) is another authority to the same effect.] In *Milward v. Forbes*, Lord *Ellenborough* says:—"There was a contract, and the defendant let the bankrupt have them on sale, and with a view to obtain payment." That is equally true here. In *Sinclair v. Stevenson*, it is true that fraud was negatived by the jury; but the judgment confirms the view now presented to the Court, of the operation of the word "consent" in the statute. *Best, C. J.*, says:—"If a person purchase a house and the utensils of a trade, knowing that he is not able to pay for them, if possession be delivered to him, does not the property in those utensils pass to him, and will they not become the property of his assignees in case of his bankruptcy? At all events, when the possession of goods has been acquired under such

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(a) 5 T. R. 215.

(b) Carr. &amp; Mar. 61.

(c) 4 Esp. 82.

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circumstances, and the bankrupt has kept that possession for three or four months, and appeared as the visible owner, they will pass to his assignees under the statute of James." It is plain that the Lord Chief Justice thought that mere possession, with the consent of the true owner, was sufficient. *Haswell v. Hunt* confirms the same construction. *Buller, J.*, says, that "Lord C. J. *Eyre* held, that the sale was made complete by the act of the plaintiffs, who, by delivery of the goods without demand of the money, vested the property in Lacey (the bankrupt) by their own assent, as a complete sale *ab initio*, without ready money." There the sellers never intended that the bankrupt should have the goods as *reputed* owner, but as *real* owner, by virtue of the sale.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case was argued before my Lord Chief Baron, and my Brothers *Alderson* and *Platt*, and myself, during the last Term. It was an action of trover against the defendants, assignees of a bankrupt, to recover goods obtained by him by a fraudulent purchase from the plaintiffs, without intent to pay for them, and which, therefore, the plaintiffs had a right to recover from the bankrupt himself, by avoiding the contract on the ground of fraud, on the principle of the case of *Noble v. Adams (a)*, and others. The purchase took place on the 1st of July, the delivery of the goods to the bankrupt on the 4th, and the fiat under which the defendants were chosen assignees issued on the 8th. The petitioning creditor's debt was contracted on the 4th of June, and there was an act of bankruptcy on the 23rd of June. The assignees took possession of the goods, and, having refused to deliver them up to the plaintiffs, they brought this action.

(a) 7 Taunt. 54.

If the act of bankruptcy is taken to be on the 23rd of June, no further question could arise; for the defence of the assignees rests on the ground that they were entitled to the goods as having been in the possession of the bankrupt as apparent owner, with the consent of the true owner, under the 72nd section of the 6 Geo. 4, c. 16. But, to come within that section, the goods must have been in the bankrupt's possession *at the time he became bankrupt*; that is, at the time of the act of bankruptcy; and if they do not come to his possession until afterwards, the statute does not apply: *Lyon v. Weldon* (a).

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If, however, our decision were to proceed upon this ground, and we were of opinion, that, if the act of bankruptcy was subsequent to the delivery, the assignees would have been entitled, we should perhaps have yielded to the request of the defendants' counsel, and have given a rule for a new trial, on payment of costs, as at the trial he had not had his attention sufficiently called to the alleged act of bankruptcy on the 23rd of June.

Our opinion, however, is, that, *assuming* the act of bankruptcy to have been after the 4th of July, the assignees are not entitled. As the goods were obtained by a fraudulent purchase, the plaintiffs had a right to disaffirm it, to revest the property in them, and recover their value in an action of trover against the bankrupt; and as the assignees take, by virtue of the assignment, such interest only as the bankrupt has, the plaintiffs had a right to recover the value of the goods in the hands of the assignees, in the same form of action, on a conversion by them, unless they were entitled to those goods under the 72nd section.

The question then is, whether this is a case of apparent ownership at the time of the bankruptcy, with the consent of the true owner, within the meaning of the repealed act, 21 Jac. 1, and the existing act, 6 Geo. 4, c. 16, s. 72, which

(a) 2 Bing. 244.



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re-enacts it. We think it was not. None of the cases cited and relied on, on behalf of the defendants, decide that where goods are obtained by fraud, before the act of bankruptcy, and are in the bankrupt's possession at that time, they pass to the assignees, under the clause relating to apparent ownership. In *Milward v. Forbes* (a), Lord *Ellenborough's* judgment proceeded on the ground, that the property actually passed to the bankrupt by the sale, under the circumstances of that case. In *Sinclair v. Stevenson* (b), the jury negatived fraud; and they also found (incorrectly it would seem) the transaction to be usurious; and, though the Chief Justice, Lord *Wynford*, appears to have expressed an opinion, that, if goods were obtained by fraud, and left in the bankrupt's possession by the true owner for a long time before the act of bankruptcy, the assignees would be entitled, on the ground of apparent ownership; that opinion was extra-judicial, and the Court did not decide the case on that ground. The third case cited was *Haswell v. Hunt* (c), which was decided on the ground that the property actually passed to the bankrupt, and not on that of apparent ownership.

Not being bound, therefore, by decision, we must consider whether this case is within the principle of the 21 Jac. 1. The meaning of this statute is well explained by Lord *Redesdale*, in *Joy v. Campbell* (d), in construing the analogous Irish Act. His Lordship says, that "it refers to chattels, where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, who ought not to have them, but whom the owner permits, *unconscientiously*, as the act supposes, to have such order and disposition." "The object was to prevent deceit by a trader from the visible possession of property to which he was not entitled; but in the construction of the

(a) 4 Esp. 171.

(b) 2 Bing. 517.

(c) 5 T. R. 231, a.

(d) 1 Sch. &amp; Lefroy, 336.

act, the nature of the possession has always been considered, and the words have been construed to mean—possession of the goods of *another*, with the consent of the true owner.”

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In order, therefore, to bring the case within the statute, there must be a real owner, distinct from an apparent owner, and the real owner must consent to the apparent ownership as such; but in this case the plaintiffs never did consent to the apparent ownership *as such*; they never contemplated the permitting the bankrupt to obtain a credit by means of the possession and apparent ownership of property which really did not belong to him. They intended to part with the property itself, and to divest themselves altogether of all right to it; and although, in consequence of the bankrupt's fraud upon them, they had a right to annul the contract, and be again the real owners, that right they did not exercise until after the bankruptcy; and consequently at the time of the act of bankruptcy, (upon which the title of assignees depends), the bankrupt was not apparent owner but real owner, and the statute does not apply.

It is to be understood that these observations are not meant to affect that class of cases in which the real owner gives, not the possession only, but an interest to the bankrupt, as where he leases the goods, under such circumstances as that the possession will necessarily, according to the habits of society, carry with it the repute of absolute ownership. These cases proceed upon the principle that the true owner does consent to an apparent ownership in the bankrupt contrary to the truth, because that is the natural result of the consent which he gives.

Whether or not this peculiar case would have fallen within the statute, if the plaintiffs had discovered the fraud long before the act of bankruptcy, and omitted, for an unreasonable time before that period, to avail themselves of the right to rescind the contract, is no question in the present case; for the act of bankruptcy followed the sale and delivery within a short time.

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It may be on that ground that the opinion of Lord *Wynford* proceeded in the case above referred to.

Our judgment must therefore be for the plaintiffs, and the rule must be discharged.

Rule discharged.

Feb. 11.

STURGEON v. WINGFIELD.

In 1742 a farm was demised by the Broderers' Company to F. for 100 years, with a covenant for perpetual renewal. In 1827, the residue of this term had become vested in B., who in that year assigned it by way of mortgage, with a proviso for redemption. On the 22nd May, 1828, H. demised the same farm for twenty-one years to the plaintiff. On the 12th January, 1836, the mortgagees and H. surrendered the premises to the Broderers' Company. On the 13th January, 1836, the company demised them to H. for 100 years; and shortly afterwards the unexpired residue of that term, and all the estate and interest of H. in the premises, were assigned to the defendant.

**T**HIS was an action of covenant, charging the defendant as the assignee of the estate of J. H. Hogarth, the lessor of a certain leasehold farm, with breach of covenant, in preserving, and not using his best endeavours to destroy, the rabbits upon the estate in question. The declaration stated, that on the 22nd of May, 1828, by a certain indenture of lease, sealed, &c., made between the Rev. John Henry Hogarth of the one part, and the plaintiff of the other, the said J. H. Hogarth demised to the plaintiff a certain messuage and lands in Essex, for twenty-one years; that J. H. Hogarth did, for himself, his heirs and assigns, covenant, that the rabbits on the said farm were not to be preserved, but that he and they would use their best endeavours to kill and keep down the rabbits on the said lands: that the plaintiff entered, and was possessed thereof for the said term so demised, the reversion thereof belonging to the said John Henry Hogarth, and that the reversion, during the continuance of the said demise and term, to wit, on the 1st of January, 1835, by assignment thereof came to and legally vested in the defendant.

In an action by the plaintiff against the defendant, on a covenant in the lease from H. to the plaintiff, to keep down the rabbits on the farm, the defendant pleaded, 1st, that H. did not demise to the plaintiff; 2nd, that the reversion on that lease did not vest in the defendant:—*Held*, that both these issues ought to be entered for the plaintiff; for that the lease, being by deed, was a good demise by way of estoppel, and a reversion in H. by estoppel was thereby created, which *primâ facie* was a reversion in fee, and therefore was not surrendered to the Broderers' Company, but passed from H. to the defendant.

Breach, that the defendant did not use his best endeavours to kill, destroy, and keep down the rabbits on the said lands. The defendant pleaded, amongst other pleas, first, that the said J. H. Hogarth did not demise to the plaintiff; secondly, that the reversion mentioned in the declaration never legally vested in the defendant.

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The cause came on for trial before *Pollock*, C. B., at the Middlesex Sittings after Trinity Term, 1845, when a verdict was found for the plaintiff for the damages in the declaration, subject to the opinion of this Court upon the following special case, and to a reference as to the amount of damages, if the decision of the Court should be in favour of the plaintiff.

On the 22nd of May, 1835, the indenture of lease in the declaration mentioned, being of a farm at Stifford, in Essex, for twenty-one years from the 24th of June then last past, at a yearly rent of 22*l.* 7*s.* 6*d.*, was duly executed by the lessor, the Rev. John Henry Hogarth, in the declaration mentioned, and by the plaintiff, the lessee. The plaintiff entered into possession of and still holds the farm under the lease, and he paid the rent reserved to the lessor Hogarth, up to Christmas, 1835; and from that period he has continued to pay to the defendant rent under the lease, and the defendant has treated the plaintiff as his tenant of the farm in question. For several years past, the plaintiff has complained that the rabbits on the farm have not been kept down, and that, in consequence, his crops have been very much damaged, and much correspondence has taken place between the plaintiff and defendant as to the amount of damage.

[The case then set forth two letters from the defendant to the plaintiff, in which the former expressed his willingness, on certain terms, to make compensation for the injury done by the rabbits.]

The farm in question was, by an indenture made and dated the 12th of May, 1742, demised by the keepers or wardens and society of the art or mystery of the Broderers

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of the city of London, to Samuel Foster, for the term of 100 years from Michaelmas, 1741, with a covenant for perpetual renewal. On the 25th of August, 1827, the residue then unexpired of that term became vested in William Bray, who, by an indenture made and dated the 25th of August, 1827, assigned the said residue of the said term, the same being then vested in him, to Richard Fleming, Thomas George Vander Gucht, James Elmslie, and William Green, by way of mortgage, to secure 5000*l.* and interest, with a proviso for redemption on payment within twelve months. After the said residue of the said term had become thus vested in the said Richard Fleming, Thomas George Vander Gucht, James Elmslie, and William Green, the indenture of lease mentioned in the declaration was made. After the making of the indenture of lease mentioned in the declaration, an indenture, dated the 12th of January, 1836, was that day made between the said R. Fleming and the said James Elmslie of the first part, the said Thomas George Vander Gucht and (the said W. Green being then dead) the said John Henry Hogarth of the second part, William Wingfield of the third part, and Richard Baker Wingfield of the fourth part, and the said keepers or wardens and society of the art or mystery of the Broderers of the city of London of the fifth part; by which last-mentioned indenture, the said Richard Fleming, James Elmslie, and John Henry Hogarth, and each of them, purported to assign, surrender, and yield up, demise, release, and quit claim, unto the said keepers or wardens and society, and their successors and assigns, the said farm, with the appurtenances, together with certain hereditaments and premises therein mentioned, for all the remainder then to come and unexpired, trust, possession, property, benefit of renewal, claim, and demand whatsoever, both at law and in equity, of them the said Richard Fleming, James Elmslie, and John Henry Hogarth, and every of them, of, in, to, or out of the said farm and appurtenances, and any and every part or parcel thereof, and also the covenant contained in the said inden-

ture in the declaration mentioned for the renewal or regrant of the lease or demise of the said farm, and all and every other covenant or covenants, if any then existing, in or in respect of any former or prior lease of the said term, or otherwise howsoever, to the intent that the residue then to come of the said term might be merged and extinguished in the reversion of the said farm, and that the said covenant or covenants for renewal might be absolutely and for ever extinguished, determined, and discharged. After the making of this indenture of January 12th, 1836, the said keepers or wardens and society of the art and mystery of Broderers of the city of London, by an indenture made and dated January 13th, 1836, demised the same farm to the said John Henry Hogarth, for the term of 100 years from Michaelmas, 1835; and by an indenture, made and dated February 4th, 1836, the unexpired residue of the said term became and was, and thence hitherto has been, vested in the defendant.

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The leases, indentures, and documents mentioned in this case, and also the pleadings in the action, are to form part of the case, and are to be considered as embodied in it.

The question for the opinion of the Court is, whether the plaintiff is entitled to a verdict on the two first issues, or either of them. If on both, the verdict is to stand, and the amount of damages to be referred; and if only on one of those issues, or on neither, a nonsuit is to be entered. The Court is to be at liberty to draw the same conclusions and inferences of fact as a jury might have done.

*Cowling*, for the plaintiff.—Two questions arise in this case: first, whether Hogarth demised to the plaintiff; secondly, whether the reversion mentioned in the declaration vested in the defendant. With respect to the first point, it is clear that the plaintiff is entitled to the judgment of the Court; for the *fact* of a demise to him is admitted on the face of this case, and no question is raised as to the nature or extent of Hogarth's interest. [*Parke*, B.—It is a de-

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mise by deed, and therefore clearly operated by way of estoppel.]

Then, secondly, a reversion in Hogarth is admitted on the pleadings; but if that were not so, a reversion by estoppel would be created, the lease of 1828 being under seal, and executed by Hogarth, the lessor: *Webb v. Austin* (a), *Gouldsworth v. Knights* (b). [*Parke*, B., referred also to *Whitton v. Peacock* (c).] The only remaining question, then, is, whether this reversion vested in the defendant. Now it must be taken, there being no traverse that the reversion belonged to Hogarth, that it continued in him; and then it appears, by the deed of February, 1836, that all Hogarth's interest, whatever it was, passed thereby to the defendant. [*Parke*, B.—The reversion must certainly be taken to continue in the same party until the contrary is shewn. That was decided in the House of Lords, in the case of *The Bishop of Meath v. The Marquis of Winchester* (d); the cesser of the reversion must be shewn by affirmative pleading. Here, therefore, the defendant ought to have shewn it. Hogarth, no doubt, had no legal reversion, because he had assigned all the residue of the term to the mortgagees; but there is a reversion by estoppel, which, whatever it was, was conveyed to the defendant.]

*Peacock*, for the defendant.—Assuming that here there was an estate by estoppel in respect of *some* reversion, the plaintiff has to shew that the particular reversion mentioned in the declaration vested in the defendant; and this has not been done. [*Parke*, B.—There is but one reversion, namely, the reversion by estoppel, and that has passed to the defendant.] At the period of the assignment of the lease by Hogarth to the defendant, he had no reversion, because the whole of the original term of years had previously vested in

(a) 7 Man. & Gr. 701; 8 Scott, 630.  
 N. R., 419.

(b) 11 M. & W. 337.

(c) 2 Bing. N. C. 411; 2 Scott,

(d) 3 Bing. N. C. 411; 3 Scott, 561.

the mortgagees. Now the defendant claims under those mortgagees, and therefore he is not bound by the estoppel which bound Hogarth. [*Parke, B.*—Taking it that in point of fact Hogarth, the lessor, had no interest at the date of his lease to the plaintiff, there was an estate by estoppel, which estate is *prima facie* a reversion in fee. Then, in February 1836, he makes a conveyance to the defendant, which passes that reversion in fee, because it passes “all his estate, right, title, and interest;” and, before that conveyance, the premises were demised to Hogarth by the Broderers’ Company, so that the estoppel was fed.] Suppose the case of a lessee for twenty-one years granting a lease of the same premises for one hundred years, with covenants on his part; and then, without any knowledge on the part of his lessor that the lessee had granted such a lease, the latter conveyed all his interest to the former by surrender or grant: would it not be competent to the landlord to shew that the reversion by estoppel did not come to him? Would he thereby become bound by all the covenants of the lease for one hundred years? [*Parke, B.*—*Rawlins’ case (a)*, which is cited in *Weale v. Lower (b)*, is an authority against you. There “Cartwright made a lease to Warlow for six years, by indenture, of a house in which he had nothing, and afterwards he purchaseth of Rawlins a lease of the said house for twenty-one years, upon condition; then Cartwright re-demiseth to Rawlins for ten years. Adjudged, 1st, that the lease to Warlow for six years was good against Cartwright, by conclusion, but nothing in interest; 2nd, that, as soon as Cartwright had purchased his lease for twenty-one years, Warlow’s interest for six years became a lease in interest, the reversion in Cartwright; 3rd, when Cartwright demised to Rawlins for ten years, Rawlins was bound by the estoppel, and took only a future interest, there being no attornment.”] *Webb v. Russell (c)* is in favour of the defendant. There mortgagor and mortgagee jointly made a lease, in

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(a) 4 Rep. 53.

(b) Pollexfen, 68.

(c) 2 B. &amp; Ald. 746.



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which the covenants for rent and repair were only to and with the mortgagor and his assigns; and it was held that the assignee of the mortgagee could not sue upon those covenants, for they did not run with the land, being collateral to the mortgagee's interest therein. A reversion by estoppel must have the same legal incidents as an actual reversion in interest; but here, if there had been an actual reversion, *Webb v. Russell* shews that it would have been extinguished by the surrender; and the new reversion gained by the lease to Hogarth from the Broderers' Company, would not have attached to it the rent reserved on the lease to the plaintiff, or the liabilities arising out of it. [*Parke, B.*—Here the reversion by estoppel, being a reversion in fee, never was surrendered: it remained, therefore, (so far as regarded the plaintiff) in Hogarth, until he assigned it to the defendant. The lease to the plaintiff was at first good by way of estoppel only; but when Hogarth took from the Borderers' Company for one hundred years, the lease to the plaintiff became a lease in interest, and the reversion upon it was afterwards assigned to the defendant.]

PARKE, B.—On the first issue, the verdict clearly must be entered for the plaintiff, that there was such a demise to him as is stated in the declaration. Then, as to the second point, as I have already said, all the reversion of Hogarth, which was a reversion by estoppel, passed from him to the defendant. This estoppel was fed by the demise for one hundred years from the Borderers' Company to Hogarth, the lessor, and thereby the lease from him to the plaintiff became good in point of interest. That lease for 100 years was afterwards assigned to the defendant, and therefore the second issue also ought to be found for the plaintiff.

ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

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HARRISON v. SAMUEL RUSCOE.

Feb. 21.

**A**SSUMPSIT on a bill of exchange for 210*l.* 10*s.*, dated 21st December, 1822, drawn by the defendant on, and accepted by, Daniel Ruscoe, payable to the order of the defendant in London four months after date, indorsed by the defendant to W. H. Vaughan, and by him to the plaintiff. Plea, that the defendant had not due notice of the non-payment of the bill. Issue thereon.

At the trial, before the Recorder of Chester, it appeared, that, the bill having become due on the 24th of April, 1845, and being dishonoured, the plaintiff's attorney, a Mr. Roberts of Chester, wrote and sent to the defendant, on the 26th, the following notice of dishonour:—

“ Sir,—I am requested *by Mr. W. H. Vaughan*, of this city, to apply to you for the payment of the amount due on you and your brother Daniel Ruscoe's dishonoured bill to him; and as Mr. Vaughan is very pressing for the amount, I trust you will immediately oblige me with the same, together with my charge as under.

“ I am, Sir, your obedient servant,

“ S. J. ROBERTS.”

Mr. Roberts, being called as a witness for the plaintiff, stated that he had no authority from Vaughan to give any notice of dishonour, and that Vaughan's name was inserted in the letter by a clerk of his, in mistake, instead of the plaintiff's. The bill having fallen due in the hands of a banker in London, a notice of dishonour given on the 26th of April would be good either for the plaintiff or for Vaughan.

It was contended for the defendant, first, that, under these circumstances, the notice of dishonour, being given in

A bill of exchange was drawn by H., indorsed by him to B., and by B. to C., in whose hands it was dishonoured. C.'s attorney gave notice of dishonour in due time to A., but stated therein, by mistake, that he was directed by B. (from whom he had no authority) to apply for payment of the bill:—

*Held*, that the notice of dishonour was sufficient, notwithstanding this misrepresentation, the only effect of which was to give A. every defence against C. that he would have had if the notice had really been given by B.

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the name of Vaughan, from whom Mr. Roberts had no authority to give it, was of no avail; and secondly, that it was bad in form, as it improperly described the bill as being the bill of the defendant and his brother. The learned Recorder thought the notice was good, and directed a verdict for the plaintiff for the amount of the bill and interest, giving the defendant leave to move to enter a nonsuit.

In last Michaelmas Term, *Atkinson* obtained a rule nisi accordingly (a); against which

*Egerton* and *Unthank* shewed cause in the present sittings (Feb. 9).—This notice of dishonour was sufficient. *Chapman v. Keane* (b) is an authority to shew, that it is enough if the defendant has notice of dishonour from any of the parties to the bill. [*Alderson*, B.—The difficulty here is, from whom is this a notice? The cases would be parallel, if Vaughan had put the bill into the hands of the attorney, and he had given the notice in the name of the plaintiff.] The cases establish, that a good notice of dishonour may be given by any of the parties to a bill, though he be not the holder. The reason is, that the last indorsee may be considered as an agent, for this purpose, for all the previous parties. The plaintiff, therefore, was for this purpose the agent of Vaughan, and might give a notice that would enure to his benefit; and then, as it is a good notice by Vaughan, it is also a good notice for the plaintiff. Supposing a general notice of dishonour had been given, without any mention of Vaughan's name, that would certainly have been sufficient; and the mistaken mention of his name does no injury to the defendant, and can make no difference in its effect.

*Jervis* and *Atkinson*, in support of the rule.—The notice

(a) The objection as to the form of the bill was given up.

(b) 3 Ad. & Ell. 193; 4 Nev. & M. 607.

of dishonour, in this case, not having been in fact authorised by Vaughan, the indorser, cannot enure to his benefit. If the position contended for on the other side be correct, that each of the parties to the bill is, for this purpose, an agent for all, then, as each indorser would have his own time to give notice, it would follow, that, if there were twenty indorsements on the bill, the last indorsee might lie by for twenty days, and then give a valid notice to the drawer. But the answer to this argument is, that there is no privity between the different parties to a bill of exchange; on the contrary, each of them holds by a title adverse to the others. Here, however, there is not the notice of any party;—not of the plaintiff, because it is not given for him; not of Vaughan, because it is not authorised by him.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case was argued a few days ago before my Brothers *Alderson* and *Platt*, and myself, at the present sittings, on shewing cause against a rule for entering a non-suit, upon a point reserved by Mr. *Welsby*, the Recorder of Chester. The case is perfectly novel, there being no decision or authority in point.

The action was upon a bill of exchange drawn by the defendant, payable to his order, by the defendant indorsed to W. H. Vaughan, and by W. H. Vaughan to the plaintiff. The defendant pleaded that there was no notice of dishonour. The bill was, in the body of it, made payable in London; it became due on the 24th of April. On the 26th, an attorney at Chester, who acted for the plaintiff, gave notice of dishonour to the defendant, stating in his letter, that he was requested by Vaughan to desire payment of the defendant's dishonoured bill; but he swore that he was not authorised by Vaughan to give that

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notice, and that he gave it in a wrong name by mistake. The only question is, whether this notice was sufficient; for we have already intimated our opinion that the notice was in sufficient time, whether it be considered as given by the plaintiff or Vaughan; and that it sufficiently referred to the bill in question, and notified its due presentment and non-payment.

Since the case of *Chapman v. Keane* (a), it must be considered as perfectly settled, that a notice of dishonour need not be given by the holder, but that he may avail himself of notice, given *in due time* by any party to the bill. The decision in that case is referred to and adopted by Chancellor Kent (b), and Mr. Justice Story on Bills of Exchange, sect. 304. The former states the rule to be, that the notice may be given by any one who is a party to the bill: the latter states it more fully, and says, that the notice will be sufficient, although not given by the holder or his agent, if it comes from some person who holds the bill when it is dishonoured, or is a party to the bill, or who would, on the same being returned to him, and after payment, be entitled to require reimbursement thereof.

The notice, by the terms of the rule as laid down by the Court of Queen's Bench, *must be given in due time* by the party to the bill, that is, in due time, if he himself were suing; and, consequently, the case of notice by a party who had himself been already discharged by the laches of the holder, is excluded. So, the terms of the rule as laid down by Mr. Justice Story seem to exclude the case of a party to the bill, who could not himself sue upon it on paying the amount of the bill; at least they must be so understood, otherwise the mischief would happen which was pointed out by Mr. *Jervis*, that there might be a bill with twenty indorsements, which the holder might retain twenty days after its dishonour, and then recover against the drawer

(a) 3 Ad. & E. 103.

(b) Commentaries, Vol. 3, p. 108.

on a notice *then* given to him by the first indorsee, which that indorsee himself could not do. Such a notice would not be in good time if given by the first indorsee, and would therefore be bad, and not support an action by the last. The rule equally excludes the case of notice by an acceptor, who never could sue himself upon the bill after taking it up; and the instances in which a notice by an acceptor has been held good at Nisi Prius (*a*), are explained by Mr. Justice *Bayley* (*b*) on the supposition, that in these the acceptor had a special authority to do so. But in the present case, *Vaughan*, in whose name the notice was given, was not discharged by the laches of the holder at the time it was given, and a notice by him on the 26th would have been in sufficient time to support an action by him, and, consequently, an action by the plaintiff. There is therefore no objection to the notice on that ground; nor would there have been any, if the attorney had omitted to state on whose behalf he applied. It was so held in *Woodthorpe v. Lawes* (*c*), and had been previously laid down in Chancellor Kent's Commentaries, (vol. 3, p. 108), who says, that any agent in possession of the bill may give the notice, and it need not state at whose request it was given, nor who was the owner of the bill.

It remains, therefore, to consider, what is the effect of giving an untrue description of the party on whose behalf it was given. This point has never been decided; for in *Chapman v. Keane*, the only case which bears upon it, the plaintiff's clerk, who gave the notice, must have been authorised, by the nature of his employment, to give it on behalf of the plaintiff, as he was, by the express authority of the holder, to give it for him; and the notice stated no untruth. Here there is an untrue statement, but made unintentionally, and by mere mistake.

(*a*) 1 Chit. R. 227; 4 Campb. 87. ch. 7, s. 2, p. 254, &c.

(*b*) Bayley on Bills, ed. 1830, (c) 2 M. & W. 109.

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There is, no doubt, a difference between the two cases, where a notice is given by an authorised person, without stating on whose behalf it is given, and where untrue information is afforded. In one case, the party is put on inquiry, if he thinks fit to make it; in the other, he is misinformed. What, then, ought to be the result of that misinformation? It is to be recollected, that, whether the party is misled or not as to *the person* giving the notice, the great object of a notice is answered by the information of the dishonour of the bill, and the person to whom notice is given is thereby enabled to withdraw his effects from, or take his remedy against, the prior parties. And we think it reasonable to hold, that the misrepresentation of the name of the person on whose behalf notice is given ought not wholly to avoid the notice, but only to place the party giving it in the same situation, as to the party to whom it was given, as if the representation had been true; and, therefore, the defendant ought to have every defence against the plaintiff that he would have had if the notice had been really given by the party named: and this is in analogy with the law as to contracts with factors acting for concealed principals, and similar cases, where the contract is not avoided by the mis-statement, but the other party has all the equities against the real as he would have had against the apparent contractor. If, therefore, in the present instance, the notice by Vaughan would have been bad, (as it would have been had he been discharged by laches, or had no right of action on the bill against the defendant if he had taken it up), the defendant would have had a defence; if good, as upon the evidence it appears that it would have been, the defendant has not been injured, and has no right to complain of the misrepresentation.

We think, therefore, the ruling of the learned Recorder was right, and the rule ought to be discharged.

Rule discharged.

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WARD v. ROBINS.

Feb. 21.

**CASE.**—The first count of the declaration stated, that, before and at the time of the committing of the grievances &c., the plaintiff was, and from thence hitherto has been, and still is, lawfully possessed of a certain rolling-mill, with the appurtenances, situate &c., and by reason thereof of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain stream or watercourse, which during all that time of right ought to have run and flowed, and until the diversion hereinafter mentioned of right had run and flowed, and still of right ought to run and flow, by means of a certain weir therein erected, a little above the said mill of the plaintiff, being kept at a certain height, unto the said mill of the plaintiff, for the supplying the same with water for the working thereof. Breach, that the defendant, on &c., wrongfully &c. pulled down the said weir, and placed and fixed the same at a much lower height than it then and there ought to have been placed and fixed, and kept and continued the same at such low height as aforesaid, &c.

Plea, that, before and at the said several times when &c., the defendant was the occupier of a certain close called &c., next adjoining to the said watercourse in the declaration mentioned, and that the defendant and all other

In case, the declaration stated, that the plaintiff was lawfully possessed of a mill, and by reason thereof of right ought to have and enjoy the benefit of the water of a watercourse which ran and flowed, by means of a weir therein erected a little above the plaintiff's mill, being kept at a certain height, unto the said mill of the plaintiff, for supplying it with water for the working thereof; and complained, that the defendant wrongfully pulled down the weir, and placed and kept it at a lower height than it ought to have been, &c.

The defendant pleaded, that, before and at the times when &c., he was the occupier of a certain close adjoining to the watercourse, and that he and all others the occupiers for the time being of the said close for twenty years *next before the commencement of the suit*, enjoyed, as of right and without interruption, the right of from time to time, as occasion required, removing a part of the weir, and placing and keeping it at a lower height than the rest, to such an extent and for such a time as was necessary for diverting enough of the water to irrigate the said close; that, at the times when &c., irrigation was necessary for the close, wherefore the defendant removed the said part of the weir, and placed and kept it at such lower height, to such an extent and for such a time as, and no more or longer than, was necessary for diverting the water for the irrigation of the said close: *quæ sunt eadem*, &c.

*Held*, that this plea was good; that it was not an argumentative traverse of the right alleged in the declaration, inasmuch as it set up a right which, under the stat. 2 & 3 Will. 4, c. 71, was not complete until the commencement of the suit, and therefore was not inconsistent with the plaintiff's right to have the weir at a greater height at the time of the act complained of.



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the occupiers for the time being of the said close, for the period of twenty years *next before the commencement of this suit*, enjoyed, as of right and without interruption, the right of from time to time, as occasion required, removing a part of the said weir, and placing and fixing the same at a lower height than the rest of the said weir, and of keeping and continuing the said part of the said weir at such low height as aforesaid, to such an extent and for such a time as was necessary and proper for the purpose of diverting and turning away a reasonable quantity of the water of the said watercourse, to irrigate the said close, and of thereby irrigating the said close, for the more beneficial enjoyment thereof, as to the said close belonging and appertaining: and the defendant says, that, before and at the said time when &c., irrigation was necessary for the said close, wherefore the defendant, at the said several times when &c., removed the said part of the said weir, and placed and fixed the same at such lower height, to such an extent and for such a time as, and no more or longer than, was necessary and proper for the purpose of diverting and turning away a reasonable quantity of the water of the said watercourse, to irrigate the said close, and did then thereby irrigate the said close, doing no more than was necessary and proper in that behalf, and doing no unnecessary damage to the plaintiff, as he lawfully might for the cause aforesaid; *quæ sunt eadem, &c.*

Special demurrer, assigning for causes, that the plea is an argumentative denial of so much of that part of the declaration to which it is pleaded, as alleges the plaintiff to be entitled, as therein in that behalf mentioned, to have and enjoy the benefit and advantage of the water of the said stream; that it is also an argumentative denial of so much of that part of the declaration to which it is pleaded, as alleges, in the manner therein mentioned, that the water of the said stream or watercourse of right ought to have run and

flowed, and of right had run and flowed, by means of the said weir, unto the said mill: that the plea amounts to the general issue, and is an argumentative traverse of the defendant's having been guilty of the grievances as to which the plea is pleaded.—Joinder in demurrer.

The case was argued during the present sittings (Feb. 13), by

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*Peacock*, in support of the demurrer.—This plea is bad. It is an indirect denial, either of the right alleged in the declaration, or of the wrongful act. If the defendant has a right to lower the weir for the purpose alleged in the plea, it amounts to a denial of the plaintiff's right always to have it higher. All that the plaintiff complains of is, that the defendant put the weir lower than he the plaintiff had a right always to have it. The defendant, in effect, denies the plaintiff's right to that extent; or else he, in effect, denies the breach by *wrongfully* lowering the weir. [*Parke*, B.—The of case *Frankum v. Earl of Falmouth* (a) shews that not guilty only puts in issue the actual diversion of the water; this plea, therefore, does not amount to not guilty; but it seems to be an argumentative denial of the right alleged by the plaintiff *always* to have the weir kept at a certain height.] It therefore gives no colour to maintain the action.—The Court then called upon

*Willes*, contra.—This plea is good. It is not an argumentative denial of the right alleged in the declaration. If it were, it should conclude with a traverse; but this plea could not, because it does not disclose facts necessarily inconsistent with the declaration. The plea is founded on the stat. 2 & 3 Will. 4, c. 71, the 5th section of which renders it necessary for a defendant, who relies on any proviso, exception,

(a) 2 Ad. & E. 452; 4 Nev. & M. 330.

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&c., or on any other cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment by the plaintiff, to plead it specially. The plea may be true, if any proviso, exception, &c. exist not inconsistent with the general right claimed by the plaintiff. [*Parke, B.*—This declaration is not framed under Lord *Tenterden's* act, but at common law, on the plaintiff's possession merely. The 2 & 3 Will. 4, c. 71, s. 5, does not apply to pleas to a declaration in an action on the case at common law, founded on the possession of the plaintiff: it leaves the pleadings upon such a declaration as before. Then your plea amounts to this, that at the time in question the weir ought not to be at the height claimed by the plaintiff, because of the defendant's prior right. That cannot be true, if the plaintiff had at that very time a right to have it at that height.] The plea does not say anything as to what was the right of the defendant "*at the said time when &c.*," except by relation to the twenty years; and it would depend entirely on the time *at which the action was brought*, whether any right existed under the statute. [*Parke, B.*—You say it is consistent with the plaintiff's right *at the time of the trespass*, that the defendant had then an *inchoate* right, which has become perfect since, by the completion of the twenty years.] Yes; in analogy to the decision on the stat. 2 & 3 Vict. c. 29,—*Unwin v. St. Quintin (a)*. [*Parke, B.*—You only undertake to cover twenty years *at the commencement of the suit*; therefore it must have been less at the time of the trespass.] The plea therefore gives colour to the plaintiff, by admitting a right at the time of the trespass, and sets up a defence not inconsistent with it, by the perfecting of the defendant's right by the completion of the twenty years at the time of action brought.

*Peacock*, in reply.—If the defendant here intended to give

(a) 11 M. & W. 277.

colour, he ought to have done so expressly. [*Parke*, B.—*Mr. Willes* says there is implied colour given.] The plea does not shew, that, at the time of the wrongful act, no complete right had accrued to the defendant, and that it has since accrued; because the enjoyment for twenty years “next before the commencement of the suit” may, in truth, have been an enjoyment for a much longer period. To make the plea good, on the ground on which the defendant now relies, it should have shewn that, at the time of the wrongful act, nineteen years only had elapsed, and that the twenty years have since been completed. There is nothing here to shew that the defendant had not enjoyed the right for twenty years at the period of the trespass. [*Parke*, B.—The defendant only undertakes to shew twenty years’ enjoyment continually up to the commencement of the suit; therefore it must be less at the time of the trespass.] Not necessarily; it may have been more. [*Parke*, B.—The essence of the defence is, that the enjoyment has continued for twenty years *up to the commencement of the suit*. The act of Parliament is so worded, that though there have been fifty years’ enjoyment up to the time of the act done, that is no defence, unless it continues up to the time of the commencement of the suit. Then this plea seems to admit that the plaintiff had a right at the time of the trespass, and sets up that the defendant had then an inchoate right, which has since been matured by twenty years’ enjoyment up to the commencement of the suit, and so that he is in the condition of a party having a title by non-existing grant. If so, it seems to me that the plea does give colour. *Rolfe*, B.—He pleads that which is never more than an inchoate right until the action is brought.] Then if the plea gives colour, it destroys it again:—that is not giving a colour *to bring the action*. [*Parke*, B.—Is it not enough to give a colour of title to complain of the trespass?] No; the colour necessary is a colourable right to maintain the

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action. In *Dr. Leyfield's case* (a), it is said, that "colour as a colour ought to have continuance, although it wants effect;" and that "it ought to be such a colour, that, if it was of effect, would maintain the nature of the action." [*Parke, B.*—That is, it must have continuance down to the time of the trespass. *Wright v. Williams* (b) shews that the periods of time mentioned in the act of Parliament cannot be construed to mean twenty or forty years *before the act complained of*. *Rolfe, B.*—The act is legal or illegal, according to the result of what happens afterwards; and the defendant pleads that that has happened afterwards which has made it legal.]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—We who heard the argument in this case, namely, my Brothers *Rolfe* and *Platt*, and myself, have considered it, and are of opinion that the plea is good. [His Lordship stated the pleadings, and continued:—] We come to the conclusion that the plea is not bad as an argumentative traverse, which is the ground of objection stated in the special demurrer, on account of the peculiar nature of the right given by Lord *Tenterden's* act, from twenty years' enjoyment by the occupier. Such enjoyment, in order to give a right under that statute, must be up to the time of the *commencement of the suit, not up to the time of the act complained of*; and, consequently, an enjoyment for twenty years or more before that act gives only what may be termed an inchoate title, which may become complete or not by an enjoyment subsequent, according as that enjoyment is or is not continued to the commencement of the suit. This apparent absurdity, arising from a strict construction of the act, has already been fully considered by this Court in the

(a) 10 Rep. 91 b.

(b) 1 M. & W. 77.

case of *Wright v. Williams* (a), and the literal interpretation adhered to, the Court intimating its opinion that the mischief of such a construction was rather apparent than real; and the decision in that case was fully approved of and acted upon by the Court of Queen's Bench, in the case of *Richards v. Fry* (b). The plea, therefore, which states an inchoate right at the time of the act complained of, but not a complete right under the statute, gives an implied colour of title to the plaintiff at the time of the act complained of; it confesses his right at that time to have the weir of a certain height, but avoids that right by shewing that the defendant was then in such a position, as that by matter subsequent he had then a right to pull down a part of the weir. Had the plea, as it might have done if the facts warranted it, stated a complete right in the defendant to reduce the height of the weir at the time of the act complained of, by non-existing grant, or prescription, it would certainly have been an argumentative traverse, as being inconsistent with the plaintiff's right at that time to have the weir of the height claimed, and would have been bad without a special traverse of the plaintiff's right. But, as the plea is founded on Lord *Tenterden's* act only, no title under *that act* can be absolutely good at the time of the act done, however long the possession might have been. The plea, stating a title under that act by prior and subsequent enjoyment together, is not inconsistent with the plaintiff's alleged right *at the time*; and therefore is not an argumentative traverse, but is good by way of confession and avoidance. Our judgment is for the defendant.

Judgment for the defendant.

(a) 1 M. & W. 77.

(b) 3 Nev. & P. 67.

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The Building Act, 14 Geo. 3, c. 78, was an act "of a local and personal nature," and therefore the power given by the 100th section of that act, of pleading the general issue and giving the special matter in evidence, was taken away by the stat. 5 & 6 Vict. c. 97, s. 3.

The defence, that the venue in an action against a person for an act done in pursuance of the Building Act, 14 Geo. 3, c. 78, was not laid in Middlesex, pursuant to the 100th section of that act, is one which must be specially pleaded, and cannot be taken advantage of under not guilty.

**TRESPASS**, for placing bricks, stones, and building materials upon the wall and close of the plaintiff. Plea, not guilty, by statute.

The cause came on for trial at the Kingston Spring Assizes, 1845, when the matter was referred to an arbitrator, with power to state any points of law for the decision of this Court.

The defence relied upon was, that the acts complained of were done in pursuance of the Building Act, 14 Geo. 3, c. 78. The arbitrator found, that the writ of summons was issued on the 14th of June, 1844, prior to the passing of the new Building Act, 7 & 8 Vict. c. 84; and that the venue was laid in Surrey. The houses of the plaintiff and the defendant adjoined to each other, being separated by a wall which had existed for several years; and the trespass consisted in the defendant's having made an addition to each end of the wall by building upon it. The defendant, at the time of such addition, bonâ fide believed the wall to be a party-wall, and intended to comply with the provisions of the Building Act. The arbitrator found that the wall was not within the city of London, or the liberties thereof, but was situate within the county of Surrey, and within the district over which the provisions of the 14 Geo. 3, c. 78, extended; that the wall upon which the building took place was not a party fence wall, nor a wall in common between the plaintiff and the defendant, but was entirely standing on the land of the plaintiff, and was his wall exclusively. Before the commencement of the action, the plaintiff gave a notice of action sufficient to satisfy the provisions of the 100th section of the Building Act, and commenced his action within three calendar months after the trespass.

The questions raised for the opinion of this Court were, first, whether the stat. 5 & 6 Vict. c. 97, s. 3, or the 7 & 8

Vict. c. 84, took away from the defendant the power of pleading not guilty by statute, under the stat. 14 Geo. 3, c. 78; secondly, supposing the Court to be of opinion that the above statutes did not take away the power of pleading not guilty, whether the defendant was entitled to the protection of the 14 Geo. 3, c. 78, by pleading not guilty, and giving the special matter in evidence, although the wall built upon by the defendant was not a party-wall, or party fence wall, and under such plea to object that the venue was improperly laid in Surrey instead of Middlesex. If the Court should think that the above statutes, or either of them, had not taken away from the defendant the power of pleading not guilty, and giving the special matter in evidence, although the wall was not a party-wall or a party fence wall, then the verdict for the plaintiff was to be set aside, and a verdict entered for the defendant; but if the Court should think that the above statutes, or either of them, did take away from the defendant the power of pleading not guilty by statute, or that he was not entitled to the benefit of pleading the general issue, and giving the special matter in evidence, in consequence of the wall not being a party-wall or party fence wall, then the next question was, whether the defendant was entitled to avail himself of the objection, under the 14 Geo. 3, c. 78, s. 100, that the venue was laid in Surrey and not in Middlesex. If the Court should think, that, upon the common plea of not guilty, the defendant was entitled to avail himself of the objection of the venue, the verdict was to be entered for the defendant; but if the Court should think that the defendant was not able to avail himself of the objection, that the venue was laid in Surrey and not in Middlesex, the verdict for the plaintiff was to stand, and the damages to be reduced to 40s.

The case was argued in Hilary Term, (January 19), by

*Unthank*, for the plaintiff.—First, the London Building Act, 14 Geo. 3, c. 78, is an act “of a local and personal

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nature," and therefore the power of pleading the general issue, and of giving the special matter in evidence, which is given by the 100th section, was taken away by the stat. 5 & 6 Vict. c. 97, s. 3 (a). The distinction between *general* and *special* statutes is laid down by Lord *Coke* in *Holland's case* (b):—"Nota, reader, the rule of the law is, that of general statutes the Judges ought to take notice, although they be not pleaded; otherwise of special or particular statutes." This is an act of the latter description, and one which, without the direction of the Legislature, the Courts will not take notice of. It is not the less so because it comprehends an extensive district. The Central Criminal Court Act, 4 & 5 Vict. c. 36, and the Metropolitan Police Act, 2 & 3 Vict. c. 47, embrace wide districts, but are not the less acts of a local and personal nature. In *Cock v. Gent* (c), an act for establishing a Court of Requests for Sandwich and its neighbourhood was held to be a public local and personal act, within the 5 & 6 Vict. c. 97, s. 3. [He then argued, that, at all events, the 14 Geo. 3 was repealed by the new Building Act, 7 & 8 Vict. c. 84, s. 1; but the Court intimated a clear opinion that that act was not retrospective in its operation, and did not apply to actions previously commenced.]

Secondly, the statutory general issue having been taken away by the 5 & 6 Vict. c. 97, the question, whether the venue ought to have been laid in Middlesex, does not arise here, for such defence ought to have been specially pleaded. The plaintiff proves a trespass in the county of Surrey: what answer is there to that, under the general plea of not guilty? In *Boyes v. Hewetson* (d), which was a local

(a) Which repeals all clauses and provisions in any act or acts "commonly called public local and personal, or local and personal, or of a local and personal nature," giving power to plead the general issue only, and to

give any special matter in evidence under it.

(b) 4 Rep. 76 a.

(c) 12 M. & W. 234.

(d) 2 Bing. N. C. 575; 2 Scott, 831.

action, the venue was laid in Middlesex, though the lands lay in Surrey; but as the locality did not appear on the face of the declaration, and no issue was raised upon it, it was held that the defendant was not on that ground entitled to a nonsuit. Here the declaration alleges a trespass in Surrey, and a trespass in that county is proved by the evidence. Suppose the objection had been, not wrong venue, but want of notice of action: could the defendant have availed himself of that under not guilty? He ought to have pleaded specially, that the act was not done under the authority of the Building Act. At common law, all that would be traversed by the plea of not guilty would be the fact of the trespass, and the plaintiff's title to the close in which &c.; under the New Rules, which are of statutory force, the former only. The defendant's argument must go to the extent, that tender of amends before action brought could have been given in evidence on this record. *Davey v. Warne* (a) is on this point a direct authority for the plaintiff.—The Court then called on

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*Martin, contra.*—First, the right given by the 14 Geo. 3, c. 78, s. 100, of pleading the general issue, and giving the special matter in evidence, is not taken away by the 5 & 6 Vict. c. 97, s. 3, for the former statute cannot be considered a local and personal act. *Holland's case* is not in point. Lord *Coke* was there discussing a different question; namely, what acts the judges were bound to take notice of, and what not. There is now no such distinction as between “general” and “special” statutes. The nature of the particular act must be taken with respect to its *parliamentary* meaning. This statute is printed and classed among the public acts. Probably it would be a *special* statute within Lord *Coke's* doctrine, but it is not therefore a local and personal act. It is published in the body of the statute—

(a) 14 M. & W. 199.

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book, numbered with the Roman numerals, and preceded and followed by public acts. The same book tells you what is the meaning of "acts commonly called public local and personal" acts; namely, local and personal acts printed as such, and having a clause declaring them to be public acts, i. e. public, so as to be taken notice of without being specially pleaded. This clearly is not an act *commonly called* a public local and personal act. The following words of the 5 & 6 Vict. c. 97, "local and personal acts," refer to such acts of the same nature as do not contain that clause; and the words "acts of a local and personal nature" are used in a still more limited sense, as divorce acts, &c. In *Cock v. Gent, Gurney, B.*, says, "The statute applies to acts *commonly called* local and personal. This is printed as a local and personal act." And Lord Abinger, C. B., says, "If the law takes no notice of such acts, *you must refer to the parliamentary meaning.*" [*Parke, B.*—All that that case decided was, affirmatively, that a Court of Requests Act, printed among the local and personal acts, *was* within the repealing clause of the 5 & 6 Vict. c. 97.] If this be a local and personal act, so is the Central Criminal Court Act, which really outrages every principle of common sense. [*Pollock, C. B.*—The statute as to the vend of coals in London is printed among the local and personal acts. Whether such acts are printed in one part of the statute-book or another, depends on whether certain fees are taken upon them or not. But the 5 & 6 Vict. c. 97, intended to go beyond those *commonly called* local and personal acts, and to include all (whether passed before or since 1797, when the present division of the statutes was first made) which were of a local and personal *nature.*] This was an act passed for the benefit of the public generally, and operates on a very great extent of property; and the intention of the Legislature, as to the light in which it should be considered, is shewn by the concluding section.

Secondly, the fact, that the venue ought to have been laid

in Middlesex, need not be specially pleaded; for this is a matter collateral to the pleading, and to which, by the express words of the statute, the Judge is to give effect at the trial. There are but two classes of pleas,—traverses, and pleas in confession and avoidance. A defence of this nature would fall within neither class. The 100th section says, that “every such action or suit, the cause whereof shall arise in any part of the limits aforesaid out of the city of London, shall be laid and tried in the county of Middlesex, and not elsewhere.” That is a provision of which the Judge at the trial is to take notice, and to which he is to give effect. The Legislature has declared, that the laying of the venue in any other county shall be an answer to the action; and it is the duty of the Court to give effect to that declaration. Who is to judge whether due notice of action has been given, the Court or the jury? Surely the former. *Boyer v. Hewetson* is no authority to the contrary: no legislative enactment was there in question.

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*Unthank*, in reply.—The mere circumstance of a statute being printed among the public acts of Parliament does not go to prove that it is a general act. The stat. 14 Geo. 3, c. 52, for lighting Grosvenor-square, is printed among the public general acts, and has a clause declaring it to be a public act; yet it surely would not be contended that that is not an act of a local and personal nature. Many road and canal acts, also, are to be found printed among the public general acts. So, also, the 13 Geo. 3, c. 75, for enabling certain persons to dispose of some houses in London by way of lottery. The clause declaring it to be a *public act* has no effect in making it a *general act*: *Brett v. Beales* (a). The very title of the 14 Geo. 3, c. 78, and many of the clauses, (e. g, ss. 33 and 37), shew it to be of a local and personal nature. Then, as to the necessity of a special plea as to the

(a) Moo. & Mal. 421.

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venue, it is incorrect to say that every special plea must necessarily be in confession and avoidance. The plea of the Statute of Limitations is an instance to the contrary: it goes to the remedy only, not to the right. [*Parke*, B.—So also, the plea that an attorney has not delivered a signed bill.] The *implied* confession contained in such pleas is sufficient; as in this instance, that the acts were done under the authority of the Building Act. The provision of the 108th section, that, “if any such action or suit be laid in any other county or place than as aforesaid, then the jury shall find for the defendant or defendants therein,” means, that the Judge shall direct the jury so to find, when the defence is properly raised by plea. [He then argued, that this was not a case in which the defendant could be said to have acted in pursuance of the Building Act; that, for that purpose, the wall in question must be shewn to be a party-wall; whereas the wall, which was the subject of the trespass, was built on the plaintiff’s land, and belonged exclusively to him. On this point, he cited *Edge v. Parker* (a), *Knight v. Turquand* (b), *Cook v. Leonard* (c), and *Jones v. Gooday* (d).]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—[Having stated the pleadings, and the facts set forth on the face of the award, he proceeded:]—The first question which the arbitrator refers to us is, whether the right of pleading the general issue, and giving the special matter in evidence, by the stat. 14 Geo. 3, c. 78, is taken away by the stat. 5 & 6 Vict. c. 97. We who heard the argument, my Lord Chief Baron, my Brother *Platt*, and myself, all agree that the right was taken away.

(a) 8 B. & C. 697.  
 (b) 2 M. & W. 101.

(c) 6 B. & C. 351.  
 (d) 9 M. & W. 736.

That statute provides, in section 3, that so much of any clause or provision in any act or acts commonly called public local and personal, or local and personal, or in any acts *of a local and personal nature*, whereby any party or parties are entitled or permitted to plead the general issue only, and to give any special matter in evidence without specially pleading the same, shall be repealed. The act 14 Geo. 3, c. 78, was not an act *commonly called* public local and personal, for that designation did not take place till long after the statute passed. On the 1st May, 1797, the House of Lords resolved that the King's printer should class the general statutes and special, the public local, and private, in separate volumes; and on the 8th May, 1801, there was a resolution of the House of Commons, agreed to by the House of Lords, that the general statutes, and the "public local and personal," in each session, should be classed in separate volumes. The question, however, is, whether the act does not fall under the description of an act of a local and personal nature. It seems singular that the new act, 7 & 8 Vict. c. 84, should not be classed amongst public local and personal acts, for it is confined in its operation to the district in and about the metropolis, with power to her Majesty to extend its limits. How this has happened cannot be explained, for it is clearly of a local and personal nature: local, as being confined to local limits; personal, as affecting particular descriptions of persons only, as distinguished from all the Queen's subjects. The 14 Geo. 3, c. 78, is of the same character in its general scope; and the only doubt that can be raised as to its being of a local and personal character, is, that it is not of a local and personal character *only*: some of the clauses affecting all the Queen's subjects, as the 84th and 86th, relating to accidental fires; and the statute is, in that respect, public. If the defence in an action arose out of either of those clauses, it would probably be held that the statutable plea was not taken away. But the defence in this case arises under that part of the

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act which is not public; in all other respects then, so far as it relates to accidental fires, the act falls under the category of a statute of a local and personal nature; and we therefore all agree, that the statutable plea of the general issue, whereby to give the special matter in evidence, was taken away in this case.

The only remaining question, which, according to the finding of the arbitrator, becomes material, is, whether the non-compliance with the requisites of the stat. 14 Geo. 3, c. 78, could be given in evidence on the ordinary plea of not guilty.

Unless the privileges are meant by that statute to be available to the defendant, and a good defence *without pleading*, or independent of the form of the plea, as the want of an apothecary's certificate has been held to be, the defendant cannot avail himself of that defence on a plea of not guilty, which merely denies the fact of a trespass having been committed. The case referred to by Mr. *Martin* (a), arising on the acts of the Court of Requests for the district of the Peak, was of the same character, and the defence was independent of the form of the plea. We think the meaning of the clause (the 100th) upon which the question arises is, that, under the plea of *not guilty* given by the statute, the non-compliance with the terms prescribed should be a defence, but not generally, whatever the form of plea might be. The clause is as follows: [His Lordship read it:]—"The defendant may plead the general issue, and give the act and the special *matter in evidence* at *any trial* to be had *thereupon*." The *special matter* which the defendant is permitted to give in evidence is all that the statute makes a defence; that is, either that the act was done by *the authority* of the statute, when the defence is complete; or that it was done in *pursuance* of it (in the sense

(a) See 6 T. R. 243, a similar clause in the Sheffield Act.

properly given by the decision to those words), in which case there will be a defence, if the defendant prove that there was a sufficient tender of amends, or that the place was within the statutable limits, and the venue is wrong; or unless the plaintiff prove that the action was commenced in due time, (which will *primâ facie* appear by the record), or that he gave a notice as required by the act. We think none of these defences are available, except under the statutable plea of not guilty; and the right of giving evidence of the special matter under that plea being taken away, the defendant must plead such matter specially, in order to avail himself of it. The rule must therefore be discharged.

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Rule discharged.

HILLS and Another v. SUGHRUE.

Feb. 13.

**ASSUMPSIT.**—The declaration stated, that, on the 21st September, 1844, by a certain memorandum in writing then made by and between the defendant, therein described

By a charter-party, the owner of the ship agreed that she should proceed direct to

Ichaboe, and there load a full and complete cargo of guano, by the ship's boats and tackle, and by the labour of the crew, and being so loaded, should proceed therewith to Cork or Falmouth, &c., and deliver the same, on being paid freight, at 4*l.* 15*s.* per ton, restraint of princes and rulers, the acts of God and the Queen's enemies, fire, and perils of navigation, always excepted. Twenty-one working days to be allowed to the charterers, if the ship were not sooner discharged, at the port of unloading. The charterers to ship bags and other materials requisite for loading the ship, and to supply the stores for the vessel, at cash prices, for the voyage, and to deduct the amount from the balance of freight; but in the event of the vessel being lost, or any other unforeseen causes preventing the completion of the charterparty, the owner agreed to pay the charterers the amount of their disbursements for such stores.

To a declaration on this charterparty, alleging as a breach of it, that the defendant, the ship-owner, did not load a full and complete cargo of guano on board the ship at Ichaboe, he pleaded a plea, which stated, in substance, that he was prevented from doing so by an unforeseen cause, namely, that on the arrival of the ship at Ichaboe, and within a reasonable time afterwards, no guano was to be found there; and that he had paid to the plaintiffs the amount of their disbursements for stores for the vessel.

*Held*, that this plea was bad in substance, for that the fact of no guano being to be found was not such an "unforeseen cause preventing the completion of the charterparty," as entitled the defendant to pay the amount of the disbursements, and treat the charterparty as at an end, but that he was nevertheless bound by his positive contract to load a full cargo.



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as owner of the ship called the "Seppings," &c., and the plaintiffs, the plaintiffs and the defendant then agreed that the said ship should proceed direct to Ichaboe, one of the Guano islands, on the west-coast of Africa, and there load a full and complete cargo of guano, free from dirt and rubbish, and in as dry a state as practicable, by the ship's boats and tackle, and by the labour of the crew, &c.; and being so loaded, should therewith proceed to Cork or Falmouth for orders, which were to be in waiting at both ports, whether to discharge there or at a safe port in the United Kingdom, and deliver the same, on being paid freight, at the rate of 4*l.* 15*s.* sterling per ton; and which freight the plaintiffs thereby bound themselves to pay for every ton of guano so delivered at the port of discharge, restraint of princes and rulers, the acts of God and the Queen's enemies, fire, and all and every the dangers and accidents of the seas, &c., always excepted; the freight to be paid, one-third on arrival at the port of discharge, and the balance by one approved bill on London at three months' date, or in cash, under discount, at the plaintiffs' option. Twenty-one working days were to be allowed the plaintiffs, if the ship was not sooner discharged at the port of unloading, and ten days on demurrage, over and above the said laying days, at £7 per day. The plaintiffs to ship bags and other materials requisite for loading the ship; the vessel, upon her return, if in London, to be addressed to Messrs. Cramond & Schuyler. The cargo to be taken from alongside the vessel at the expense and risk of the plaintiffs, and the plaintiffs to supply the stores for the said vessel, at cash prices, for the voyage, and deduct the amount from the balance of freight; but, in the event of the vessel being lost, or any other unforeseen cause preventing the completion of this charterparty, the defendant thereby agreed to pay the plaintiffs the amount of the disbursements for the stores supplied by him to the ship. The declaration set forth other stipulations of the charterparty, not material to

this report; it then alleged mutual promises, and averred that the plaintiffs shipped on board the vessel the bags and other materials requisite for loading the ship, and supplied the necessary stores; and that, although the defendant was not prevented by restraint of princes, &c. &c., from fulfilling the agreement on his part, and although, within a reasonable time, the plaintiffs' said orders, directed to the captain at Cork and Falmouth, which were in waiting at both ports at the arrival of the ship at Falmouth, and thereby directed that the ship should proceed to London to discharge her cargo, and although the plaintiffs were always ready and willing to take such cargo from alongside the vessel at their own expense and risk, and to pay freight for the same according to the said indenture, &c., of which proceeding the defendant had notice; and, although the said ship did, to wit, on &c., proceed direct to Ichaboe aforesaid, and arrived there, to wit, on &c., and although a reasonable time for her to load the cargo in the said memorandum mentioned at Ichaboe aforesaid, and to proceed therewith to Cork or Falmouth, and thence to London, elapsed before the commencement of this suit; yet the defendant has disregarded the said memorandum and his promise, in this, to wit, that the said ship did not, at Ichaboe aforesaid, load a full and complete cargo of guano, free from dirt and rubbish, &c. &c., by the ship's boats and tackle, and by the labour of the crew, but, on the contrary thereof, loaded a very small quantity, to wit, twenty tons of guano, and no more, and the same was full of dirt and rubbish, &c. &c.

The defendant pleaded, that, the plaintiffs having supplied the stores for the said vessel at cash prices, amounting to the sum of 183*l.* 15*s.* for the said voyage, the said ship did, after the making of the said memorandum or charterparty, to wit, on &c., proceed direct to Ichaboe aforesaid, and arrived there, to wit, on &c.; and that, upon and after the arrival of the said ship at Ichaboe aforesaid, certain, to wit, the said unforeseen causes preventing the

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completion of the said memorandum or charterparty, mentioned and provided therein, arose, that is to say, the unforeseen causes as hereinafter mentioned, which then and there, and afterwards, wholly prevented the completion of the said memorandum or charterparty: and the defendant in fact says, that upon and after the arrival of the ship at Ichaboe aforesaid, and within a reasonable time and with all reasonable despatch after the arrival of the said ship at Ichaboe aforesaid, the master and crew of the said ship, to wit, Charles Grant, then being the master of the said ship, and one William Hall, being then chief mate of the same, and eight other persons of the crew of the said ship, landed at Ichaboe aforesaid, with the ship's boats and tackle, for the purpose of procuring the said guano in the said memorandum or charterparty mentioned, free from dirt and rubbish, and in as dry a state as practicable, wherewith to load a full and complete cargo in and on board the said ship, in fulfilment of the terms and conditions of the said memorandum or charterparty; yet the said defendant avers, that there was not, at the time the said persons so landed on the said island for the purpose aforesaid, nor within a reasonable time thereafter, any guano as in the said memorandum or charterparty specified, free from dirt and rubbish, to be had, procured, or obtained, wherewith to load a full and complete cargo, or any part thereof, for the said ship, or to be had or procured in or upon the said island: whereupon, and by reason of such unforeseen cause as aforesaid preventing the completion of the said memorandum or charterparty, the said ship afterwards, to wit, on the 17th day of September, 1845, necessarily and unavoidably returned from Ichaboe aforesaid, without a full and complete cargo of guano, free from dirt and rubbish, as in the said memorandum specified, or any part thereof: and thereupon afterwards, and after the return of the said ship from Ichaboe aforesaid to England (the plaintiffs and defendant then having notice of the premises aforesaid), the defendant, to wit,

on &c., pursuant to the terms and conditions of the said memorandum or charterparty, paid to the plaintiffs the said amount of the said disbursements in the said memorandum or charterparty provided, and in the said first count mentioned, for the stores so supplied by them to the said ship, as in the first count of the declaration mentioned, the same amounting to the said large sum of money, to wit, to the sum of 183*l.* 15*s.*, according to the terms and conditions of the said memorandum or charterparty: Wherefore the defendant saith, that the plaintiffs ought not to have or maintain their aforesaid action thereof against the defendant; and this the defendant is ready to verify, &c.

Special demurrer, assigning for causes (inter alia), that the plea improperly assumes that the stipulation in the said memorandum contained, providing for the event of the said vessel being lost, or any other unforeseen causes preventing completion, imports that the defendant was not to be liable for the breach of the said contract to load, proceed with, discharge, and deliver, as therein mentioned, such cargo of guano as aforesaid, in the event of any unforeseen causes preventing the defendant from performing such contract; whereas the said stipulation imports no more than that, in the event thereby provided for, the defendant was to pay to the plaintiffs the amount of their disbursements for stores supplied by them to the ship for the voyage; and that, though the plea does not deny in any way either the contract or the breach of contract above alleged, or the averment in the declaration that the defendant was not prevented from performance by restraint of princes, &c., yet the defendant attempts to deny his liability for such breach; and further, that the inability of the defendant, by reason of the matters in the plea mentioned, to perform his contract, affords no defence in law to the plaintiffs' claim for damages for the non-performance of it, &c. &c.

Joinder in demurrer.

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*J. Henderson*, in support of the demurrer.—This charterparty differs in an important respect from all those upon which such questions have arisen in reported cases. In all of them, the *charterer* expressly or impliedly stipulated to provide a cargo, and was bound to a particular number of days for loading. Here he does not contract to provide any cargo, but the *owner*, on the other hand, expressly and unqualifiedly contracts to load a full and complete cargo. [*Parke*, B.—He probably never *intended* so to contract, but only to load a cargo of guano, if guano were found.] This is a peculiar case, in which the owner might reasonably so contract, because nothing more was necessary than the mere personal labour of the master and crew: it is distinct in its nature from any other cargo. [He cited *Blight v. Page* (a), and *Paramour v. Yardley* (b).]—The Court called on

*Hoggins*, contra.—First, this declaration is bad. The contract mentioned in the charterparty is merely a contract by the owner to *load* a cargo of guano, not to *get and* load it. His obligation is limited to the loading in the manner pointed out, with ship's tackle and crew: and it was the charterer's duty to provide the cargo for that purpose. The owner's contract is satisfied, if, with his crew, he loads the cargo provided by the charterer. [*Parke*, B.—In that case, the contract would have been to receive and load the cargo received from the charterer, and there would have been lay days for loading; but that is not so here. *Rolfe*, B.—Who was to get the cargo?] The charterers' factor there. [*Parke*, B.—Is a factor to be found in the island of Ichaboe? Very probably the defendant meant only to get the cargo, if it was to be found; but he has not said so. The case is

(a) 3 Bos. & P. 295, n.

(b) Plowd. 539.

like that of *The Marquis of Bute v. Thompson* (a); the defendant has entered into a positive contract, and he must perform it.] It is submitted, that this is no more than the ordinary contract between the charterer and the shipowner. [*Parke, B.*—No; quite otherwise: the ordinary contract is to receive the cargo from the agents of the charterer, with lay days for loading. There is no doubt as to this part of the case; the defendant has undertaken to load the cargo, and he must load it.]

Secondly, the case mentioned in the plea is specially provided for by the charterparty, when it stipulates, that, in the event of any unforeseen causes preventing the completion of the charterparty, the defendant shall repay the plaintiffs the amount of their disbursements for the ship's stores for the voyage. [*Parke, B.*—That only provides for the repayment of the disbursements: it does not say, that, if unforeseen causes should arise to prevent the getting of the guano, the charterparty shall be at an end.] It must reasonably be so interpreted; because it cannot mean that the owner is to be at all the expense and responsibility of the voyage, and then to be liable for not supplying a cargo which he could not obtain. The return of disbursements must be applicable to that case. There is nothing to shew that the owner is to be an *insurer* of a full cargo of guano. The "other unforeseen causes" must apply to such a case as this. The words are—"preventing the completion of the charterparty,"—not "the completion of the voyage:" the parties, therefore, do not contemplate merely the loss of the ship on the voyage, but the occurrence of events which may defeat the performance of the undertaking. It being mere matter of speculation whether any guano was left on the island of Ichaboe, the parties thus provide for the event of there being none. [*Parke, B.*—You say, if anything oc-

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(a) 13 M. & W. 487.

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curs to prevent the completion of the charterparty, the advances are to be repaid, and nothing else: the other side say, that it is only an advance of payment by way of freight, which, if no freight becomes payable, is to be repaid; but in the meantime the party must perform his contract, which is to procure and load a full cargo, or to pay damages if he does not. There is nothing releasing him from the performance of his positive contract.] The defendant contends, that this is in the nature of a *defeasance* on the whole agreement, which is an agreement between these parties as co-adventurers. The one is to receive freight, if the adventure is successful; if it be not, the other is to receive back his stores, and the adventure is at an end. It cannot have been intended, that the one should get a profit by the rise of the market, whereas the other gets nothing, in one event, but a mere remuneration for his labour, and in the other is to be subject to heavy damages. If that were the contract, words would have been introduced guaranteeing the providing of guano at all events. The reasonable construction is, that, there being no cargo to be obtained of which the plaintiff could make a *profit*, the defendant puts him beyond *loss* by the return of his advances.

*J. Henderson*, in reply, was stopped by the Court.

PARKE, B.—I think this plea is bad in substance. The question arises entirely on the construction of this charterparty. The first part of it provides, that the ship, of which the defendant is the owner, shall proceed direct to Ichaboe, and there load a full and complete cargo of guano, free from dirt and rubbish, &c., by the ship's boats and tackle, and the labour of the crew, and, being so loaded, shall proceed direct to Cork or Falmouth, &c. Then follows a provision that the plaintiffs shall ship bags and other materials requisite for loading the ship, and shall supply the stores for the

vessel, at cash prices, for the voyage, and deduct the amount from the balance of freight; and then a clause discharging the charterer from liability in the event of the vessel being lost, or of any other unforeseen causes preventing the completion of the charterparty; but there is no provision for his discharge in the case of inability to find a cargo of guano; and in the clause providing for the lay-days, there is no mention of days for loading the cargo. If the instrument stopped here, there could be no doubt that this is an absolute stipulation to provide a full cargo of guano, and, however he may be prevented from doing so, that the defendant would be bound by that stipulation. He is to receive freight at a high rate, and it looks very much like a contract for supplying guano at that price. But then Mr. *Hoggins* contends, that, inasmuch as it is provided, that in the event of any unforeseen cause preventing the completion of the charterparty, the defendant is to pay the plaintiffs the amount of the disbursements for the stores supplied by them to the ship, and as it could not be foreseen that guano would not be found at Ichaboe in sufficient quantity to load, he is, in such an event, discharged from liability on repayment of the amount of such disbursements; but, on fully considering that clause, from which alone any doubt could arise, it seems to me that none really exists. The stipulation of the plaintiffs is in reality nothing more than a stipulation to pay the amount of the necessary disbursements for stores for the voyage, in advance of the freight; then, if the ship be lost, or any other unforeseen cause arise to occasion a loss of the freight, the charterer is to be repaid that advance. If the parties meant to refer to any unforeseen cause which might prevent the loading of a cargo, they would have said so; but they have not; they have only said, that if the plaintiff do not repay himself his advances from the freight, the defendant shall repay it. But if the defendant do not perform his positive contract, by loading a cargo, he is to be answerable in damages, to be

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measured, of course, by the market price of the guano: if it rises, the damages will be substantial; if it falls below the freight, they will be nominal. It is a positive obligation to procure and load a cargo; and the case resembles that of *The Marquis of Bute v. Thompson (a)*, where there was an absolute covenant, by a lessee, to raise a certain quantity of coals in each year, and it was held to be no answer that no coals were to be got. Our judgment will therefore be for the plaintiffs.

ROLFE, B.—I am of the same opinion. The exceptions in this charterpar of princes and ruines, fire, and the minor stipulation, for the vessel, at the balance of freight vessel, or any other completion of the charter disbursements. It may possibly never a stipulation for the defendant; but this earlier part of the positively contract

PLATT, B.—That a full cargo of goods Ichaboe, by the services of the crew. Unengrafted, within we are to read that it comes within that. That stipulation is

necessary for the voyage at cash prices, and deduct the amount from the balance of freight; and, on the other hand, that in the event of the vessel being lost, or of any other unforeseen event preventing the completion of the charterparty, the defendant shall repay them that amount. It is clear, as my Brother *Parke* has said, that this payment was merely a payment beforehand of freight to be earned; and all the *re-payment* is of the amount *not* earned; but it leaves all the other engagements of the charterparty untouched; and the defendant, therefore, is liable, on his express contract, to load a cargo, and is without defence to this action.

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Judgment for the plaintiff.

EDWARD SLATER and MARIA ANN, his Wife, v.  
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Feb. 21.

THIS was an action of detinue for the title-deeds of an estate, of which the declaration alleged that the plaintiffs were lawfully possessed, as of their own property, in right of the plaintiff Maria Ann. The defendant pleaded non detinet; secondly, that the plaintiffs, in right of the said Maria Ann, were not possessed as of their own property

A testator devised lands to his grandson, G. D., to hold the same unto and to the use of the said G. D., for the term of his natural life; and from his decease, unto and

to the use of all and every the *lawful issue* of the said G. D., their heirs and assigns for ever, equally, as tenants in common and not as joint-tenants, when and as he, she, or they should attain his, her, or their age or ages of twenty-one years. And the testator devised all the residue and remainder of his real and personal estate and effects, whatsoever and wheresoever, not before otherwise disposed of, to his daughter, S. D., absolutely, for her own sole and separate use.

*Held*, that, in the above devise, *issue* was to be construed "children," and therefore G. D. took an estate for life only, with remainder to his children as purchasers, and not an estate tail; and therefore that, on his death without issue, S. D. took under the residuary devise, notwithstanding a deed of disentailor executed by G. D. in his lifetime: for a deed of disentailor, executed under the 3 & 4 Will. 4, c. 71, has no effect in barring future contingent estates, unless the party executing it was in fact a tenant in tail.

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of the deeds, &c. in the declaration mentioned.—Issues thereon.

By consent of the parties, the following case was stated, under a Judge's order, for the opinion of this Court:—

Henry Taylor, of Barking, in the county of Essex, carpenter, being seised in his demesne as of fee of and in the hereditaments, for the deeds and writings relating to which this action is brought (and which are hereinafter described as and called, “the premises in question”), on the 21st day of August, 1823, duly made, signed, and published his last will and testament in writing, bearing date the same day and year aforesaid, and thereby (amongst other things) gave and devised the premises in question in the words following:—“Also, I give and devise unto my grandson, George Dangerfield, all those three freehold messuages or tenements which I purchased of James Hawkins Hayllar, with the outhouses, yards, and gardens and appurtenances thereto belonging, situate in the High-street of Barking aforesaid, and now in the occupation of William Bowers, John Wallround, and William Reed; also all that freehold piece or parcel of marsh land which I purchased of James Sanders, Esq., called Little Paradise Marsh, containing by estimation four acres or thereabouts, with the appurtenances thereunto belonging, situate in Barking aforesaid, and now in the occupation of James Crow, his under-tenants or assigns: To hold the same unto and to the use of my grandson, George Dangerfield, *for and during the term of his natural life*: And from and immediately after his decease, I do give and devise the same unto and to the use of all and every the *lawful issue* of my said grandson, George Dangerfield, their heirs and assigns for ever, equally, as tenants in common and not as joint-tenants, when and as he, she, or they shall attain his, her, or their age or ages of twenty-one years.” And in the said will was also contained a devise and bequest of the residue and remainder of the real and personal estate of the said testator, in the

words or to the effect following, that is to say: "Also I give and bequeath all my stock and utensils in trade, household furniture, plate, linen, and china, and all other my *real and personal estate and effects* whatsoever and wheresoever, not hereinbefore by me otherwise disposed of, unto my said daughter, the wife of the said James Dangerfield, to and for her own sole and separate use, benefit, and disposal, independent of, and without being subject or liable to, the debts, control, management, or engagements of her present or any future husband she may marry, in manner hereinbefore mentioned."

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The said Henry Taylor, after the making of the said will, died seised of the said premises in question, and without having revoked or in any manner altered the same will, leaving the said George Dangerfield and Sarah Dangerfield respectively him surviving, and also leaving his grandson, Henry Wellington Taylor, his heir-at-law, and which said will was duly proved in the proper ecclesiastical court.

The said George Dangerfield entered into possession of the premises in question, and continued possessed thereof until the month of July, 1824, when he departed this life without having had any issue. The said George Dangerfield, on the 16th day of January, 1844, by an indenture of disentailer, duly executed by the said George Dangerfield, Eliza, his wife, and the said Henry Wellington Taylor, conveyed the premises in question to the said Henry Wellington Taylor and his heirs, to the uses, on the trusts, and for the purposes in that indenture mentioned.

The said Sarah Dangerfield, the residuary devisee, departed this life in the month of May, 1837, intestate, leaving Henry Dangerfield, her eldest son and heir-at-law.

The said Henry Dangerfield, on the 13th day of February, 1838, duly made and published his last will and testament in writing, bearing date on the same day and the year last aforesaid, in the words or to the effect following, that is to say, "First, I direct that all my just debts, funeral ex-

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penses, and testamentary charges, be fully paid and settled. After which I bequeath the whole of my property, of whatever description, unto my wife Maria Ann Dangerfield, for her sole use and benefit, namely, my household furniture, my ready money, my funded property, my interest in the house and shop I occupy, my landed property, also my plate, and any kind of property I may die possessed of, for her sole use and benefit; and I also appoint my said wife Maria Ann Dangerfield my sole executrix."

The said Henry Dangerfield, after the making of his said will, namely, on the 10th day of April, 1839, departed this life without having revoked or in any manner altered the same, leaving the said Maria Ann Dangerfield his widow him surviving; and the said will was, soon after the decease of the said testator, duly proved in the proper ecclesiastical court.

The said Maria Ann Dangerfield, after the decease of her said husband, namely, on the 20th day of January, 1844, intermarried with and became the wife of the plaintiff, Edward Slater, and is one of the plaintiffs. The defendant is, and was before and at the commencement of this action, in the possession of the deeds and writings for which this action is brought, and has refused to deliver them up to the plaintiffs, or to either of them, or to any one on their or either of their behalves, although he has had due notice of the intermarriage of the plaintiffs, and although the said deeds and writings have been, before this action brought, and since the intermarriage of the plaintiffs, duly demanded of him.

Copies of the said wills of the said Henry Taylor and Henry Dangerfield respectively, and also a copy of the said indenture of disentailer, and also a copy of the issues in this cause, are contained in the appendix to this case, and are for all purposes to be considered as constituting a part of this case, and by the Court, counsel, and all parties, to be used and referred to accordingly.

The questions for the opinion of the Court are :—

1st, Whether the said George Dangerfield took merely an estate for life in the premises in question, under and by virtue of the will of the said Henry Taylor?

2nd. Whether, in the events which happened, the said Sarah Dangerfield took an estate in fee-simple, expectant on the decease of the said George Dangerfield in the premises in question, under and by virtue of the said will?

If the Court should be of opinion, that, under and by virtue of the said will, the said George Dangerfield took merely an estate for life, and that the said Sarah Dangerfield took an estate in fee-simple in remainder in the premises in question, and that the said estate was not defeated by the deed of disentailer, then the defendant agrees that judgment shall be entered generally for the plaintiffs, by confession of the defendant, in respect of all the deeds, &c., mentioned in the declaration, damages £3000, (to be reduced to one shilling upon the delivering up of the said deeds, &c.): but if the Court shall be of opinion that the said George Dangerfield took a greater estate, or that the said Sarah Dangerfield did not take an estate in fee-simple in remainder in the premises in question, under or by virtue of the said will of the said Henry Taylor, or that the same was defeated by the said deed of disentailer, then the said plaintiffs agree that a judgment shall be entered against the plaintiffs of nolle prosequi; such judgment in either case to be entered immediately after the decision of this cause, or otherwise as the Court may think fit.

The case was argued at the sittings after Trinity Term, 1845 (June 28), by

*Smirke*, for the plaintiffs: who argued that the word "issue," in this will, was used by the testator as being synonymous with "children;" that he appeared in various parts of the will to use the two words indifferently, having,

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in three out of eleven devises to grandchildren and their descendants, used the word "children" only, in others the word "issue" only, in others both words; while the concluding proviso, which overrode them all, appeared to shew that he had the same disposing intention as to all; that, in the direction to his executors to apply the rents for the maintenance of the *issue* of his grandchildren, it was clear he could not mean their issue generally, that is, all their descendants. That there was no inflexible rule of law to prevent this construction prevailing, and the word "issue" being interpreted to mean "children," where upon the whole will such appeared to be the intention of the testator. He contended, therefore, that George Dangerfield took for life only, and that on his death without issue, the residuary devise took effect. He cited and commented on the following authorities:—*Festing v. Allen* (a), *Doe d. Hills v. Hopkinson* (b), *Merest v. James* (c) *Lees v. Moseley* (d), and *Greenwood v. Rothwell* (e).

Secondly, he contended, that the words of the residuary devise carried all the real estate which remained undisposed of by the devise to George Dangerfield and his children, &c., to Sarah Dangerfield, and by his death without issue, her estate became an indefeasible estate in fee. And, lastly, that the deed of disentailer executed by George Dangerfield had no operation to defeat that estate, for that, under the stat. 3 & 4 Will. 4, c. 74, s. 3, it had the effect of a recovery at common law only when made by a *tenant in tail*, which, for this part of the argument, he was assumed not to be.

. *Bovill*, contra, urged, that there was no such expressed

(a) 12 M. & W. 279.

(b) 5 Q. B. 223.

(c) 1 Brod. & B. 484.

(d) 1 Y. & C. 589.

(e) 5 Man. & G. 628.

intention in the will, to use the word "issue" as a word of purchase, as the Court could give effect to consistently with the rules of law, which considered it as a word of limitation: that, in some cases, the words "children," and "son," had even been held to be words of *limitation*, as in *Robinson v. Robinson* (a), *Broadhurst v. Morris* (b), *Mellish v. Mellish* (c), and *Doe d. Garrod v. Garrod* (d); but that, according to all the authorities, "issue" was *prima facie* to be read as a word of limitation, and as *nomen collectivum*, indicating descendants of every degree, and being equivalent to "heirs of the body": *Doe v. Applin* (e), *Denn v. Puckey* (f), *Doe d. Cock v. Cooper* (g), *Mogg v. Mogg* (h), *King v. Burchall* (i), *Tate v. Clark* (k), *Jesson v. Wright* (l), *Doe d. Atkinson v. Featherstone* (m). He urged, that a consideration of the other parts of the will aided this construction: first, there were no children in existence at the time of making the will; secondly, there was no devise over on failure of issue; and, upon the whole context, the words went to shew that the testator meant to designate a class through which the descent was to pass; and that this construction avoided all the difficulty which arose from having an indefinite class of parties to take under the devise. That there were many cases shewing that the words of *division*, "as tenants in common," would not prevent an estate tail from being acquired: *Jesson v. Wright*, *Doe d. Cock v. Cooper*, *King v. Burchall*, *Denn v. Puckey*, *Bennett v. Earl of Tankerville* (n).

Secondly, he contended that the residuary devise passed an estate for life only, and not a fee; the words "all other my real and personal estate," &c., being a designation of the

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(a) 1 Burr. 38.

(b) 2 B. &amp; Adol. 1.

(c) 2 B. &amp; C. 250.

(d) 2 B. &amp; Adol. 87.

(e) 4 T. R. 82.

(f) 5 T. R. 299.

(g) 1 East, 229.

(h) 1 Meriv. 654.

(i) 1 Eden, C. C., 424; 4 T. R. 296, n. (d).

(k) 1 Beav. 100.

(l) 2 Bligh, P. C., 1.

(m) 1 B. &amp; Adol. 944.

(n) 19 Ves. 170.



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*property, not of the interest: and cited Doe d. Hurrell v. Hurrell (a) and Doe d. Lean v. Lean (b).*

Thirdly, that even if George Dangerfield took an estate for life only, the estates in his children were contingent estates, and the estate would in the mean time vest in the heir-at-law; and the deed of disentailer had the same effect as a fine or recovery would formerly have had, in divesting the contingent estates, and creating a tortious fee.

*Smirke*, in reply, relied on *Lees v. Moseley* and *Greenwood v. Rothwell (c)*.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This was an action for the title deeds of an estate at Barking, and the only question is, whether the plaintiffs are the parties entitled to the land to which the deeds relate.

The question arises under the will of Henry Taylor, which bears date the 21st August, 1823, and which, so far as it is material to set it out, is as follows:—"Also I give and devise unto my grandson, George Dangerfield, all those three freehold messuages or tenements which I purchased of James Hawkins Hayllar, with the outhouses, yards, and gardens, and appurtenances thereto belonging, situate in the High Street of Barking, aforesaid, and now in the occupation of William Bowers, John Wallrond, and William Reed; and also all *that freehold* piece or parcel of marsh land, which I purchased of James Sanders, esquire, called Little Paradise Marsh, containing, by estimation, four acres or there-

(a) 5 B. & Ald. 18.

(b) 1 Q. B. 229; 4 P. & D. 662.

(c) The arguments and authorities in this case are so fully

stated in the judgment, that it has been thought unnecessary to report the argument in greater detail.

abouts, with the appurtenances thereunto belonging, situate in Barking aforesaid, and now in the occupation of his undertenants or assigns: *to hold the same unto and to the use of my said grandson George Dangerfield, for and during the term of his natural life; and from and immediately after his decease, I do give and devise the same unto and to the use of all and every the lawful issue of my said grandson George Dangerfield, their heirs and assigns for ever, equally, as tenants in common, and not as joint tenants, when and as he, she, or they, shall attain his, her, or their age of twenty-one years.*"

In the said will was also contained a devise and bequest of the residue and remainder of the real and personal estate of the said testator to the effect following (that is to say):—

"Also I give and bequeath all my stock and utensils in trade, household furniture, plate, linen, and china, and all other my real and personal estate and effects whatsoever and wheresoever, not hereinbefore by me otherwise disposed of, unto my said daughter, Sarah, the wife of the said James Dangerfield, to and for her sole and separate use and benefit and disposal, independent of and without being subject or liable to the debts, control, management, or engagements of her present or any other future husband she may marry, in manner hereinafter mentioned."

Henry Taylor died seised soon after the date of his will, and, on his death, George Dangerfield the devisee entered, and being seised, he, on the 18th of January, 1844, by an indenture of disentailer, conveyed the property in question to certain uses, under which the defendants, claiming title to the lands, obtained possession of the deeds in question.

In July, 1844, George Dangerfield died, never having had any issue. Sarah Dangerfield, the residuary devisee, died in 1837; and all her right to the lands in question under the residuary devise has become vested in the plaintiffs.

This action is brought for the conversion by the defendant of the deeds in question; and it is admitted that a verdict shall be entered for the plaintiffs, if, under the circum-

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stances, they are entitled to the lands devised by George Dangerfield.

The point, therefore, to be decided, is, what estate George Dangerfield took. If he took an estate tail, then, by the deed of disentailer, the rights of all persons in remainder, including the plaintiffs, who claim under Sarah Dangerfield, the residuary devisee, have been barred, and the present action cannot be sustained; but if he took for life only, with remainder to his children as purchasers, then, as he never had any issue, on his death, the plaintiffs, as claiming under the residuary devisee, became entitled in possession, and will be entitled to recover in this action.

The question, therefore, is one of those which are of very frequent occurrence, namely, whether the word "issue" is to be treated as a word of limitation or a word of purchase. The general rule in such cases is clear and well established. The word "issue," in a will, *primâ facie*, means the same thing as heirs of the body, and is to be construed as a word of limitation; but this *primâ facie* construction will give way, if there be on the face of the will sufficient to shew that the word was intended to have a less extended meaning, and to be applied only to children, or to descendants of a particular class or at a particular time.

Though, however, the rule thus stated is perfectly simple, yet its application is often very difficult. The real question in each particular case is, what are the circumstances which are to be considered sufficient to indicate that the word has been used in a restricted sense. Indeed, the rule itself is one not more applicable to the word "issue," than it is to the words "heirs of the body," or indeed to any other words which can be suggested. In all cases, the *primâ facie* import of words used by a testator is liable to be controlled or modified by the context.

When it was once established that a devise to a man and his issue, means the same thing as a devise to him and the heirs of his body, it might have appeared reasonable to hold

that all the rules of construction applicable to the latter words were applicable to the former also; considering the great importance of abiding by general rules in the interpretation of wills, with the view of attaining as much certainty and uniformity of decision as the subject admits of. But the Courts have been less reluctant to narrow the *prima facie* meaning of the word "issue," than of the words "heirs of the body," and have done so in some cases, so nearly resembling the present, and so incapable of being distinguished from it on any satisfactory ground, that we, without deciding what the construction would have been, if the words "heirs of the body" had been used, feel ourselves bound to take the same course, and to hold that the grandson, George Dangerfield, took an estate for life.

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The case of *Greenwood v. Rothwell* (a) is precisely in point. That was a devise to J. G. for his life, and after his decease to all and every the issue of his body, as tenants in common, and the heirs of such issue. Under this devise the Court of Common Pleas decided that J. G. took an estate for life only. That case is a distinct authority for holding, that, where there is a devise to one for life, with remainder to his issue as *tenants in common*, with a limitation to the heirs general of the issue, the issue take as purchasers in fee. It would be impossible for us to decide in the case before us that the grandson took an estate tail, without at the same time overruling the case of *Greenwood v. Rothwell*. All the circumstances there indicating that the word *issue* was used as a word of purchase, and not of limitation, occur also in the case before us, with the further circumstance, that in the present case the parties to take under the description of issue, are only to take *when and as they attain the age of twenty-one years*, which brings the case very closely within the principle of *Merest v. James* (b), where a gift over, in

(a) 5 Man. & G. 628.

(b) 1 Brod. & B. 484.

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case of the issue dying under twenty-one, was of itself held sufficient to shew that the word issue was used in its limited, and not its general sense. Whether the decision in that case was quite satisfactory, is not now the question, but it would be a strong thing, where, as in the present case, we find, as well the qualification which in *Greenwood v. Rothwell* was sufficient to induce the Court to treat the word issue as a word of purchase, as also the circumstances which in *Merest v. James* were considered to have the same effect, to hold that both those cases are to be disregarded, and that, acting on the same supposed rule of law, the more extended and legitimate meaning of the word issue must be adhered to.

But it is not merely these two cases which we should have to encounter, in deciding that the grandson took an estate tail. Such a decision would be in direct opposition to the case of *Lees v. Moseley (a)*, in this court. That was a devise to H. J. for life, with remainder to his lawful issue, and their respective heirs, in such shares as H. J. should appoint; but in case H. J. should not marry and have issue who should attain twenty-one, then to testator's son and his heirs. The Court, after great deliberation, held issue there to be a word of purchase, and that H. J. took for life only. The decision proceeded on the ground, that the issue were intended, in default of appointment, to take as tenants in common, and to take an estate in fee, but only in the event of their attaining twenty-one; and those circumstances were held sufficient to shew, that issue was used in its restricted and not its *primâ facie* general meaning of descendants extending through all time. This case appears to us as not merely to be decisive of the present, but to go beyond it; for in that case there was what is not found here, namely, a devise over; a circumstance which has, in several cases, been mainly and even exclusively relied on, as the ground for

(a) 1 Y. & C. 589.

deciding the word issue to have been used in its extended sense, and as a word of limitation. This was certainly the main ground on which the cases of *Doe v. Applin* (a) and *Doe v. Cooper* (b), relied on by the defendant, proceeded. The Court, in those and similar cases, construed the devise over *in default of issue*, as clearly meaning a devise on a *general failure of issue*; and, proceeding on that construction of the *devise over*, it was a very natural corollary, that the original devise to the issue must have been also intended to embrace all issues, so as to make the objects of the devise co-extensive with those on failure of whom the devise over was to take effect; and this might fairly justify the Court in disregarding circumstances, which, but for the devise over, would have had the effect of narrowing the *primâ facie* meaning of the word "issue."

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All the other cases relied on by the defendant will, on examination, be found either to have turned on the words *heirs of the body*, and not the word *issue*, or else to have wanted some of the circumstances, which, in *Merest v. James*, *Lees v. Moseley*, and *Greenwood v. Rothwell*, were held to make the word "issue" a word of purchase, and not a word of limitation.

Upon these authorities we feel ourselves bound to hold, that the grandson, George Dangerfield, took for life only, and that, on his death, without having had issue, the residuary devise took effect.

It may be right to advert to one matter contended for in the argument at the bar, namely, that in this case there was in fact a devise over, inasmuch as the residuary clause would carry all the interest not previously given to the issue; but this is founded altogether in fallacy. The gift over, in the cases where that has been relied on, has always been a gift over *expressly* in default of issue, and its importance, in helping the Court to come to a decision, has de-

(a) 4 T. R. 82.

(b) 1 East, 229.

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pendent entirely on the circumstance that it has been to take effect only on a general failure of issue. Whether the language has always been such as fairly to warrant the Court in saying that the devise over was to take effect only on a general failure of issue, and so, reasoning backwards, to infer that in the original devise the word issue meant *issue extended through all generations*, may be matter of doubt; but it is quite clear that the tenor of the reasoning on which, in these cases, the Judges have proceeded, cannot be applied to a general residuary devise of all not previously disposed of. It can make no difference whether the interests in real estate undisposed of are to be carried by the law to the heir, or are disposed of by the testator to the devisee.

It remains only to advert to a point rather suggested than seriously argued, that, even taking George Dangerfield to have been tenant for life only, yet that the deed of disentailer had the same effect as a fine or recovery would formerly have had, in divesting the subsequent contingent estates, and so creating a tortious fee. But the answer given by the plaintiffs' counsel was conclusive. The deed would have had no such operation at common law, and its effect under the statute depends entirely on its having been executed *by a tenant in tail*; and as we are of opinion that George Dangerfield was not tenant in tail, his deed can have no statutable operation.

We are therefore of opinion, that, for the reasons we have already stated, George Dangerfield took an estate for the term of his life only; and that, on his death, without having had any issue, the plaintiffs, claiming under the residuary devise, became entitled to the lands in question, and consequently that they are entitled to our judgment in this action.

Judgment for the plaintiffs.

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ESDAILE, Public Officer of The LONDON AND WESTMINSTER BANK, v. MACLEAN.

THE declaration stated, in its commencement, that the plaintiff, "one of the registered public officers *for the time being* of and for certain persons united in co-partnership, and carrying on the trade and business of bankers in England, in and by the name, style, and firm of the London and Westminster Bank, who now sues as such public officer as aforesaid, for and on behalf of the said banking company, under and by virtue of a certain act of Parliament made and passed in the seventh year of the reign of his Majesty King Geo. 4, for (amongst other things) the better regulating co-partnerships of certain bankers in England; and of a certain other act of Parliament made and passed in the eighth year of the reign of her Majesty Queen Victoria, intituled 'An Act to regulate Joint Stock Banks in England,' by R. R., his attorney, complains of the defendant, who has been summoned to answer the plaintiff, as such public officer as aforesaid, in an action of debt, &c.; and the plaintiff demands of and from the defendant, the sum of £8950, which he owes to and unjustly detains from him," &c.

The declaration contained eight counts, in the form given by the rule of Trinity Term, 1 Will. 4, on bills of exchange for different sums, amounting in the whole to £3950, drawn by the defendant, payable to his order, and indorsed by him to the London and Westminster Bank. One of these counts (the 5th) stated the bill to be drawn upon "one W. Watson." And each of these counts, after its first descrip-

A declaration, commencing and concluding in the form of a declaration in debt, contained counts on bills of exchange by indorsee against indorser, in the form given by the rule of T. T., 1 Will. 4, and also indbitatus counts in debt:—*Held*, not a misjoinder.

A declaration in debt by the public officer of a banking company described the plaintiff as "one of the registered public officers for the time being of &c., who now sues as such public officer as aforesaid," &c. and stated that the defendant had by the writ been summoned to answer the plaintiff as such public officer:—*Held*, on special demurrer, that it sufficiently shewed the plaintiff to have

been the public officer at the time of the commencement of the action.

The declaration recited the stat. 7 Geo. 4, c. 46, as "an act of Parliament made and passed in the 7th year of the reign &c., for (amongst other things) the better regulating co-partnerships of bankers in England."—*Held*, a sufficient recital of the act.

In a declaration on a bill of exchange it is informal to describe any of the parties to the bill by the initials only of his christian name, without shewing that he is so described in the bill itself.

In a declaration containing several counts on different bills of exchange, each count, after describing the bill, referred to it as "the said" bill of exchange:—*Held*, sufficiently certain, even on special demurrer; for that the words "the said" ought to be referred to the last antecedent.



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tion of the particular bill of exchange mentioned therein, referred to it as "the said bill of exchange."

The declaration then stated, that the defendant was indebted to the said *bank* in £5000, for money paid, money lent, work and labour, commission, interest, and on an account stated; and it concluded in the usual form of a declaration in debt.

Special demurrer, on these grounds: That there is a misjoinder of the forms of action, all the counts except the last being framed as in an action on promises, and it being stated in all those counts that the defendant promised to pay the several bills of exchange therein mentioned, and yet the last count is framed in debt, with the ordinary and usual form of a conclusion for a count in debt, and counts in debt cannot be joined in the same declaration with counts on promises: That there is no breach of the several promises mentioned in the counts relating to the bills of exchange, and it is nowhere stated in the declaration, that the defendant disregarded any of those promises: That the action is in debt, and the defendant has been summoned to answer the plaintiff in that form of action, and yet several counts are inserted in the declaration, having the ordinary and usual conclusion of counts on promises: That no legal mode or right by which the plaintiff could sue the defendant by virtue of being public officer of the Banking Company is stated or shewn in the declaration, inasmuch as it is not stated or shewn therein, that he was such public officer at the time of the commencement of this suit; and the expression, that he is such public officer "for the time being," is vague and uncertain, and may refer to any time whatever from the beginning of the world: That it is not stated that the plaintiff was such public officer, or that the said persons were united in copartnership as bankers, at the time when the several bills of exchange were indorsed by the defendant, or when the said contracts in the last count mentioned were entered into by him, or that they continued

in copartnership up to the time of the commencement of the suit, or that they carried on in such copartnership the trade and business of bankers: That the title of the first-mentioned act of Parliament under which the plaintiff professes to derive authority for suing is incorrectly recited, inasmuch as it is not stated what the other things are for which the said act of Parliament was made: That the said plaintiff cannot sue by virtue of both the said acts recited, and he should have elected under which he intends to sue, and stated his right in the declaration accordingly: That a person can only sue as a public officer of a banking company under the last-mentioned act of Parliament, where the banking company have complied with the provisions of such act, that is to say, where they have delivered to the Commissioners of Stamps and Taxes the accounts and returns required by the said act and the act therein mentioned; and yet it is not stated in the said declaration that the said London and Westminster Bank have complied with those provisions or any of them: That there are divers blanks in the said declaration, inasmuch as it is stated in the fifth count, that the defendant directed the said bill therein mentioned to one W. Watson; and it is not stated what the said W. Watson's christian name is, nor whether the plaintiff used any diligence or made any inquiries to find it out, or that it was unknown to him: That it is uncertain which of the said bills in the said second, third, fourth, fifth, sixth, seventh, and eighth counts respectively mentioned, the defendant indorsed, inasmuch as it is stated in each of those counts that he indorsed "the said" bill, and it is uncertain which of the said bills in the first eight counts of the said declaration respectively mentioned is meant, inasmuch as no less than eight bills are named in the said declaration, and the words "said bill" may refer to any of them: That the cause of action in the ninth count is stated absurdly, inasmuch as a bank, being an inanimate object, cannot provide work and labour, or forbear money,

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or state an account, though a banking company may do so. That the said action ought to be stated to accrue to the London and Westminster Bank, or to the said Company, and not to the plaintiff: That no contract on which the defendant is liable is stated in the said last count, inasmuch as it is stated therein that the said money therein mentioned was to be paid to the said bank, instead of to the said banking company.

Joinder in demurrer.

*Prideaux*, in support of the demurrer.—First, this declaration does not sufficiently shew that the plaintiff was the registered public officer of the banking company at the time of the commencement of the action. In *M<sup>c</sup>Intyre v. Miller (a)*, the declaration was in the same form as the present. Upon a motion to quash a writ of error as frivolous, which had been sued out upon this objection together with another, *Parke*, B., intimated an opinion, during the argument, that this was no sufficient ground of error; but the point was not directly decided. Here the question arises on special demurrer. The words “for the time being” may have relation to the time of the delivery of the declaration, or indeed to any other time. [*Parke*, B.—The declaration states also, that the defendant has been summoned to answer the plaintiff “as such public officer.”]

The second objection is, that one of the statutes on which the plaintiff’s title to sue is founded, is not correctly recited in the declaration. The stat. 7 Geo. 4, c. 46, is stated to be an act for, *amongst other things*, regulating co-partnerships of bankers in England. That is stating only a part of the title of the act. [*Parke*, B.—It does not state it to be the title of the act.]

The next objection is as to the misjoinder of counts in debt and in assumpsit. All the counts on the bills of ex-

(a) 13 M. & W. 725.

change are counts in assumpsit. They all state a *promise* to pay on the part of the defendant, which is an essential part of a count in assumpsit; whereas, in debt, a promise is never alleged: Rastall's Entries, f. 176; *Corbett v. Packington* (a), *Lea v. Welch* (b), *Palmer v. Staveley* (c), *Brill v. Neele* (d). The last case extremely resembles the present. There a count, stating that the defendant was indebted to the plaintiff for work and labour, and, being indebted, undertook and promised to pay &c., whereby an action had accrued &c., was held not to be a good count in debt, and therefore not capable of being joined in a declaration with counts in debt. *Dalton v. Smith* (e), there cited, is to the same effect. The other side will probably rely on *Cloves v. Williams* (f), and *Compton v. Taylor* (g), where it was held, that a count by *payee* against acceptor of a bill of exchange, in the form given by the rule of T. T., 1 Will. 4, was held to be well joined with indebitatus counts in debt. In *Donaldson v. Thompson* (h), it was held, that, in an action by indorsee against maker of a promissory note, it was unnecessary to allege any promise, "as *the promise* is always implied by law." And in *Smith v. Cox* (i), it was expressly decided, that, in an action by indorsee against *'drawer* of a bill of exchange, it is necessary to allege a promise to pay; the Court saying, that "unless a promise be alleged in declarations on bills of exchange, there will be nothing to distinguish the action of assumpsit from that of debt;" and that, "from aught that appears, there being no promise alleged, *there might be a misjoinder of counts* on the record." That case appears to be a decisive authority for the defendant upon this point. [*Alderson*, B.—That case only decides, that where a promise is *not* alleged,

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(a) 6 B. &amp; C. 268.

(b) 2 Ld. Raym. 1516; 2 Str.

793.

(c) 12 Mod. 517.

(d) 3 B. &amp; Ald. 208.

(e) 1 Smith, 618.

(f) 3 Bing. N. C. 868; 3

Scott, 68.

(g) 4 M. &amp; W. 138.

(h) 6 M. &amp; W. 316.

(i) 11 M. &amp; W. 475.

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it is not a good count in assumpsit; but the difficulty here is, supposing this to have been an action for goods sold, how is the defendant to know whether he should plead non assumpsit or nunquam indebitatus?] In this case he cannot plead either of those pleas to the whole declaration; but the principle is just the same. [*Parke, B.*—*Cloves v. Williams* was on general demurrer; however, we no doubt relied upon that case in *Compton v. Taylor*, where the point arose on special demurrer.] Those cases appear to have been decided from the Court having attributed too much weight to the verbal language used in the forms of the counts on bills of exchange, given in the rule of T. T., 1 Will. 4. *Alderson, B.*, observed, in *Compton v. Taylor*, that “the forms given in the rules, which apply to both assumpsit and debt, make no difference in the cases: . . . one form is given for both, and this is that form.” But it is to be observed, that the rule itself speaks of the schedule of forms as being drawn up as applicable to actions of assumpsit only; and goes on to say, that “if any declaration in *debt* for similar causes of action, and for which the action of assumpsit would lie,” shall exceed the length of those forms, no costs of the excess shall be allowed to the plaintiff; and *Smith v. Cox* shews, that the intention of the rule was not to create any confusion between the two forms of action. It is very important to a defendant, in an action on a bill or note, whether it is debt or assumpsit, because in the former case execution would go against him on the judgment, without any intermediate proceeding; whereas in the latter there is a rule to compute. Again, the form of the plea of payment into Court is different. [*Parke, B.*—The question is, whether the general conclusion is not sufficient to shew that there are counts in debt.] In *Brill v. Neele*, each of the counts concluded by stating that an action had accrued, &c. The defendant has a right to know with certainty, from the declaration, which is the form of action. [*Parke, B.*—It is not pointed out by the demurrer that it is *ambiguous* whether

it is in debt or assumpsit; the only objection is that of *misjoinder*. *Alderson*, B.—The objection of *uncertainty* is not taken.] The defendant has a right, if these counts bear a double aspect, to assume against the plaintiff that they are counts in assumpsit.

There is also a formal objection to the fifth count. The count states the acceptor as being one W. Watson. It ought to have shewn what was his Christian name, or that he was designated in the bill of exchange as W. Watson: *Appelmans v. Blanche* (a), *Ceal v. Cockburn* (b). The party pleading must either set out the name at full length, or bring himself within the exception in the statute.

Another objection of form exists to all the counts on this bill of exchange, except the first; namely, that they do not state that the particular bill mentioned in each count was indorsed to the Banking Company. They only speak of the “said bill;” which may refer to that mentioned in the first count. They ought to have described it as the *last-mentioned* bill. [*Alderson*, B.—Does not the word “said” refer to the last antecedent?] *Ashton v. Brevitt* (c) is a case which illustrates the strictness with which the Court looks at the term “last aforesaid,” or words of like import.

*Butt*, contra.—The case just cited is quite distinguishable from the present. There it was altogether uncertain which parcel of goods was referred to as “last aforesaid.” But the word “said” always *primâ facie* refers to the last antecedent, until something is shewn to render a different construction necessary. Each count here constitutes a separate cause of action; and it will not be assumed that any of the counts has reference to the preceding ones. As

(a) 14 M. &amp; W. 154.

(b) 7 Scott, N. R. 413.

(c) 14 M. &amp; W. 106.

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to this point, he cited *Rex v. Wright* (a); Finch's Discourse of Law, b. 1, ch. 3, there cited.

Secondly, as to the objection to the 5th count. It is the invariable course of pleading, since the stat. 3 & 4 Will. 4, c. 42, so to describe the parties to a bill or note. [*Parke, B.*—You ought to say, “therein described as W. Watson.” You cannot depart from the rule of the common law, without shewing that such is the designation of the party in the bill: otherwise you may, in every case, describe a party by his initials.] The real name of the party may be wholly unknown. [*Alderson, B.*—You need only say that he is “therein described” as W. Watson. *Parke, B.*—It does not follow, because you allege that the defendant directed the bill to W. Watson, that he was so described on the face of the bill.] How can the Court intend that the real name is not W. merely? [*Parke, B.*—You have no right under the statute to designate a party by his initials, unless he is so designated in the instrument; then you ought to shew that he was so designated.]—He cited *Walker v. Parkins* (b), and *Lindsay v. Wells* (c).

As to the objection to the statement of the plaintiff's title as public officer, he cited *Owen v. Waters* (d).—And,

PER CURIAM.—You may amend, if you think fit, on payment of costs, by striking out the 5th count: as to the other counts of the declaration,

Judgment for the plaintiff.

(a) 1 Ad. & E. 434.

(b) 2 D. & L. 982.

(c) 3 Bing. N. C. 777.

(d) 2 M. & W. 91.

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## LILLYWHITE v. DEVEREUX.

Feb. 21.

**T**HIS was an action brought against the defendant as executrix in her own wrong of James Edward Devereux, deceased. The declaration contained, amongst others, a count for the use and occupation of a dwelling-house, and also a count for goods sold and delivered to the deceased in his lifetime, and promises by him. Nothing turned on the other two counts. At the trial, before *Tindal*, C. J., at the last Assizes for Surrey, it appeared that the defendant was the daughter of the deceased, and had intermeddled with his property after his decease. It was proved in evidence, that the house had been let furnished by the plaintiff to the deceased, at 1*l.* 5*s.* per week. About the middle of December, 1845, the plaintiff, who was himself a tenant to a Wm. Kent, was desirous of getting rid of that tenancy from the 25th of the month, the end of the current year of his holding, and offered to sell the furniture of the house to the deceased for £50. This the deceased thought too much, but verbally agreed to have the goods valued, and pay as much as they should be found worth, Mr. Kent agreeing to accept the deceased as tenant from that day. On the 14th, a valuer of the name of Piggott was sent for, with the approbation of both parties, who valued the goods at £80. This the defendant refused to give, but offered to give the amount, £50, at which the plaintiff had before offered to sell them. On Christmas eve, one Elland, the brother-in-law of the plaintiff, took the key out of the street door of the house and gave it to the defendant—the deceased being at that time very ill—with a view of giving up the house to the deceased, that a new holding should be commenced after that

A., being himself yearly tenant of a house to B., underlet the house and furniture at a weekly rent to C.

A. being desirous of getting rid of his tenancy at the end of the current year, offered to sell the furniture to C. for £50; which C. thought too much, but verbally agreed to have it valued, and to pay so much as it should be found worth, on B.'s agreeing to accept him as his tenant instead of A. The furniture was valued at £80, which C. refused to give, but then offered the £50. Before the expiration of the year, an agent of A. took the key out of the door and gave it to C., telling him that he must settle with A. himself about the furniture. B. refused to accept C. as his tenant, and he continued to

occupy the house and use the furniture as before, but continually giving notice to A. to take away the furniture, which he refused to do; and after the lapse of three months, C. sent it to a broker's :—*Held*, that, upon these facts, there was no evidence to go to the jury of an acceptance by C. of the furniture, under a contract of sale, to satisfy the Statute of Frauds.



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period under Kent. On that occasion the defendant said, after she received the key, "How about the furniture?" to which Elland replied, "You must settle about that with Wm. Lillywhite (the plaintiff). Kent refused to receive the deceased as his tenant, and he continued to occupy the house and furniture as before, giving to the plaintiff, however, continually notice to take away the furniture, which he refused to do; and ultimately, about the 17th of March following, it was removed by the deceased to a broker's near, and notice thereof was given to the plaintiff. Soon afterwards, the deceased removed to another house with his daughter. The action was brought to recover the rent up to this period, and also the price of the furniture. The Lord Chief Justice directed the jury, first, that there was no evidence of any change in the terms of the tenancy, as the intended holding under Kent had gone off, and without the consent of the plaintiff to letting the house at a lower rent than the 1*l.* 5*s.* per week; and, secondly, that it was for the jury to say, whether, by continuing in possession after the valuation, the deceased did not accept and take possession of the furniture at the valued price. The jury found a verdict on both counts, damages £92.

In last Michaelmas Term, *Montagu Chambers* obtained a rule nisi for a new trial, on the ground of misdirection, contending that there was no evidence of any delivery or acceptance of the furniture, within the Statute of Frauds.

*Dowling*, Serjt., now shewed cause.—It was altogether a question for the jury to determine whether there had been a sufficient acceptance of the goods to satisfy the Statute of Frauds. And there was in this case evidence of the acceptance to go to the jury. It was proved that the deceased had bargained for this furniture; that it had been valued for him to take, and that he afterwards continued to use it. Even where goods have remained in the possession of the vendor, that has not been considered of itself sufficient to

prevent the statute from being satisfied, if this was at the instance of the vendee: *Elmore v. Stone* (a), *Edan v. Duffield* (b). The deceased never did any act to repudiate the goods, and mere words will not do for that purpose. How otherwise could he have *accepted* them? [Platt, B.—Wherever the supposed vendee exercises a dominion over the thing supposed to be sold, is it not for the jury to say whether they will refer it to the sale or not?] The Court then called on

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*Chambers* and *Fortescue*, in support of the rule.—It is quite impossible that the ruling of the learned judge can be right on both points. He first tells the jury there is no evidence of any change in the terms of the tenancy, the intended arrangement with Kent having gone off; and he then leaves it to the jury to say, whether, notwithstanding the occupation by the deceased was to be of the same nature and at the same rent as before, the fact of his using the furniture was not evidence of his acceptance of it under the assumed sale. Now, the original tenancy was of a *house and furniture*; and although the rent issues out of the realty, yet it is considered that the realty is so far improved by the furnishing, as to make the eviction of the furniture occasion a suspension of the rent. How, therefore, can such use of such furniture be any evidence whatever of the possession *as owner*? Is not, on the contrary, the demand and payment of rent for it clear and conclusive evidence to the contrary? There is no evidence whatever of any intention of the parties that the deceased should thereafter hold from the plaintiff on the terms on which he was to have held of Kent, if the arrangement had not gone off. The ceremony of the delivery of the key was with reference to a holding under Kent,—a giving up possession to the deceased as *his* agent and tenant,—which Kent refused to recognise; and the plaintiff conse-

(a) 1 Taunt. 458.

(b) 1 Q. B. 302; 4 P. & D. 656.

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quently continued Kent's tenant. In like manner the verbal arrangement respecting the furniture had reference to the intended holding under Kent. Now, it is not pretended that there was any note in writing to satisfy the statute, and it is admitted that the deceased, *in words*, always repudiated the purchase. Then, if there was a delivery and acceptance, when was it? Not, confessedly, at the time the valuation was made known, for at that time the plaintiff had only a reversionary right to sell, and rent was paid and accepted up to Christmas following, as for both house and furniture. Was it then when the ceremony of the delivery of the key took place? Certainly not; because, at that time, the present defendant is proved to have said to Elland, "How about the furniture?" to which he replied, "*You must settle with Lillywhite* (the plaintiff) about that;" and it could not be afterwards, because, as the jury have found, according to the opinion of the Chief Justice, and as the fact was, the occupation was on the same terms as before. There have, indeed, been many cases in which a constructive or symbolical delivery has been held sufficient; but in every one some *act* has been done by the party held liable—some change in the state of circumstances has occurred, indicative of an intention to accept. In *Chaplin v. Rogers* (a), a stack of hay, standing on the plaintiff's premises, was sold; the defendant had it cut, and took away part: here was an act done by the parties, and it was held sufficient. So, in *Rohde v. Thwaites* (b), there was a sale of sugar in bulk, twenty hogsheads, to be filled by vendors: four were filled and delivered, the rest filled up, and notice given to vendees, who said they would send for them. So in *Rugg v. Minett* (c), certain turpentine casks were filled up, with others, by the direction of the buyers, and it was held, the goods being bulky, to make a complete transfer of property to the buyers. Many other cases to the same effect might be cited, but in every

(a) 1 East, 192.

(b) 6 B. &amp; C. 388.

(c) 11 East, 210.

one of them there has been some act done, some change of circumstances or dealing with the property, indicative of a change of ownership. Here is a total absence of any such evidence: the parties were landlord and tenant of house and furniture up to Christmas; they remained so after Christmas; they held the furniture as tenants before, and their possession of it after was consistent with the same holding. Even in the case which has perhaps gone further than any other upon this subject, *Edan v. Dudfield*, there was some evidence; for there the defendant sold the goods again, and rendered a debtor and creditor account, the goods being at the time in his possession; and this was held sufficient evidence of acceptance to go to the jury.

But though it is generally true, that whether there is *any* evidence is a question for the judge, but the *effect* of the evidence a question for the jury, there are many cases to shew that evidence, to bind a party, must be of a clear and decisive character; and slight circumstances, though raising a *suspicion* of intention, are not to be left to the jury in cases arising under the Statute of Frauds. Thus, in *Tempest v. Fitzgerald* (a), a horse was sold by the plaintiff to the defendant, to be taken away and paid for at a certain time; shortly before the expiration of that time, he called, saw the horse, and rode him, and gave directions about his treatment; and it was left to the jury to say whether, in so doing, he was exercising an act of ownership, or whether it was merely by way of trial, and the jury having found a verdict for the plaintiff, the Court set it aside for misdirection, and granted a new trial. So, likewise, in *Howe v. Palmer* (b), an act was done which in an ordinary case it would be difficult to say was not evidence, of however slight a nature; but the Court held, that the question ought not to be left to a jury, and a rule was made absolute to set aside the verdict and enter a nonsuit, leave having been

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(a) 3 B. & Ald. 680.

(b) 3 B. & Ald. 321.

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reserved for that purpose. [*Pollock*, C. B.—What do you say is evidence that should be left to a jury?] It is difficult to lay down a general rule on the subject; but these cases, and others to the same effect, are sufficient to shew that the act of ownership must be unequivocal, and not every slight matter from which an inference may be drawn is to be left to a jury. In the present case, however, there was *no* evidence whatever, no change of circumstances, either in the parties or the goods; no change of possession, or of the character of possession, and the deceased from the first to the last repudiated the contract of sale.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—This case was argued last term before my Lord Chief Baron, my Brother *Platt*, and myself. The motion was, that there should be a new trial, unless the plaintiff would consent to reduce the verdict. There were two demands: one for the use and occupation of a house; and the question as to that was, whether the rate of charge should be as for a furnished or an unfurnished house; in the one case, the amount of damages being, as to this part of the demand, £5, in the other, 17l. 10s. The second demand was for the price of the furniture, alleged to have been sold by the plaintiff to the deceased. This question turned upon the fact, whether there had been an acceptance of goods by the testator, so as to take the case out of the operation of the Statute of Frauds; there was no contract in writing for the purchase. The Lord Chief Justice left this question to the jury, who found in favour of the plaintiff. The goods in question, the subject of dispute, were in the possession of the defendant at the time when the contract was made.

No doubt can be entertained, after the case of *Edan v. Dudfield*, which was well decided by the Court of Queen's Bench, that this is a question of fact for the jury; and that, if it appears that the conduct of a defendant, in dealing with goods already in his possession, is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract, so as to take the case out of the operation of the Statute of Frauds:—as, for instance, if he sells or attempts to sell goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alters the nature of the property, or the like. But we think such facts must be clearly shewn; and, in this case, after careful consideration of all the facts contained in my Lord Chief Justice's notes, we can find no sufficient evidence of this sort. We therefore think the verdict of the jury, as to this part of the case, is altogether wrong; and that there really was no evidence of acceptance, so as to take this case out of the operation of the Statute of Frauds. And if so, it is clear that the subsequent possession by the testator was the use and occupation of a furnished and not of an unfurnished house. We therefore think there should be a new trial, unless the plaintiff consents to reduce the damages to 17*l.* 10*s.*

Rule absolute accordingly.

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## IN THE EXCHEQUER CHAMBER

*(In Error from the Court of Exchequer).*

Feb. 6 &amp; 7.

RAWLINSON v. CLARKE.

A. sold to B., by deed, his interest in the profession and practice of a surgeon and apothecary, carried on by him in Park-street, Camden Town, for £900, £500 to be paid on the execution of the deed, and £400 at the expiration of a year. A. covenanted not to exercise the profession within three miles of his then place of business; and also, that, during the space of one year from the date of the deed, he should continue to reside in Park-street aforesaid, and to carry on and attend to the said profession and practice as he had hitherto done; and that he would, to the utmost of his power, introduce B. to his patients, and do every reasonable act for promoting the interest of the concern. And B. covenanted, in consideration thereof, to allow A., during the year, a moiety of the clear profits of the concern, to be paid at the expiration thereof:—*Held*, that the parties were not hereby constituted partners in the trade during the first year, and, therefore, that B. might sue A. for monies received by him from their patients during that year.

**COVENANT.**—The declaration stated, that, by a certain indenture, dated the 11th day of May, 1843, made between the plaintiff and defendant, the defendant covenanted that he would pay the plaintiff £400 at the times and in the proportions following, viz., one moiety on the 11th of November then next, and the remaining moiety on the 11th of May, 1844. And it was further agreed between the parties, that the drugs, stock in trade, utensils, and shop-fixtures of the plaintiff, then upon certain premises in Park Street, Camden Town, should be valued by a competent person, to be named by the plaintiff and defendant in the usual way, and the amount thereof paid by the defendant to the plaintiff; one moiety thereof immediately the value of the said drugs, stock in trade, &c., should be ascertained, and the other moiety at the expiration of one year from the date of the said indenture. Averment, that the said drugs, stock in trade, utensils, and shop-fixtures, were forthwith, and before the expiration of one year, valued by a competent person, to wit, one S. Lahee, named by the plaintiff and the defendant in the usual way, at £190, of which the defendant had notice; and that a year had elapsed from the date of the said indenture before the commencement of the suit. First

breach, that although the defendant had paid the first moiety of the said £400, he had refused to pay the other moiety of the said sum of £400. Second breach, that although the defendant had paid one moiety of the value of the said drugs, stock in trade, &c., immediately the same was ascertained, yet he had refused to pay the other moiety of the said value at the expiration of one year from the date of the said indenture.

Second plea, set off for money had and received, money paid, and on an account stated. The plaintiff traversed the set off, and issue was joined thereon.

Third plea, as to the second breach, that the said drugs, stock in trade, utensils, and shop-fixtures, were not at any time valued by a competent person named by the plaintiff and defendant, modo et formâ. Issue thereon.

The cause was tried before *Pollock*, C. B., at the Middlesex sittings after Hilary Term, 1845, when the plaintiff below gave in evidence that Lahee was agreed to by the plaintiff and defendant as a proper person to value the drugs, stock in trade, utensils, and shop-fixtures; that the valuation being completed, except as to the drugs, a sum of £70 was agreed on by the plaintiff and defendant as the value of the drugs, and £50 as the value of a horse and gig belonging to the plaintiff below, making, together with the rest of the valuation, £190, £95 of which was then paid by the defendant to the plaintiff, and a receipt given for it. The Chief Baron left it to the jury to say whether the horse and gig were part of the stock in trade; and that, if they were of opinion that such was the case, the plaintiff was entitled to a verdict on the third plea. To this ruling the defendant below excepted. The bill of exceptions also stated, that the counsel for the said E. A. Rawlinson, "to maintain and prove, on his part, the issue joined upon the second plea, gave in evidence the indenture mentioned in the declaration (a), and also offered to give in evidence that divers

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(a) The indenture was set out as follows :—" This indenture, in the bill of exceptions, and was made the 11th day of May, 1843,



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sums of money had been received by the said J. Clarke from divers persons, who, during the first year from the

between J. Clarke, &c., of the one part, and E. A. Rawlinson, &c., of the other part: Whereas the said J. Clarke has for many years now last past carried on the profession or practice of a surgeon and apothecary in Park Street, aforesaid, and being desirous of disposing of the same, he hath agreed to sell, and the said E. A. Rawlinson to purchase the same, at or for the price of £900, payable as follows: £500 on execution of these presents, and the remaining sum of £400 in equal moieties, that is to say, one moiety on the 11th day of November next, and the remaining moiety on the 11th day of May, 1844, and upon the said J. Clarke entering into the several covenants and agreements hereinafter mentioned. Now these presents witness, that, for carrying the said agreement into effect, and also in consideration of the sum of £500 by the said E. A. Rawlinson to the said J. Clarke paid at or upon the execution of these presents, the receipt whereof &c., and also in consideration of the further sum of £400, to be paid at the times and in the manner hereinbefore mentioned, he, the said J. Clarke, hath granted, bargained, sold, assigned, transferred, and set over, and by these presents doth grant, bargain, sell, assign, transfer, and set over unto the said E. A. Rawlinson, all interest, benefit, profit, and advantage whatever to him, the said J.

Clarke, to be from thenceforth had, made, or obtained by or from the said profession or practice carried on by him in Park Street aforesaid, or of any of the patients now or hereafter belonging thereto (subject as to one twelvemonth from the date hereof, to the stipulation or agreement hereinafter mentioned), and all the right and title of him the said J. Clarke of, in, or to the said profession or practice; to have, hold, receive, and take all and singular the said interest, benefit, profit and advantage to be from thenceforth had, made, or obtained from the said profession or practice and premises hereby assigned or intended so to be, unto the said E. A. Rawlinson, his executors, administrators and assigns, in as full, large, and ample a manner to all intents and purposes as the said J. Clarke might have held and enjoyed the same in case these presents had not been made. And the said J. Clarke doth for himself, his heirs, &c., covenant, promise, and agree to and with the said E. A. Rawlinson, his executors, &c., in manner following, that is to say, that he, the said J. Clarke, shall not nor will at any time or times hereafter, directly or indirectly, by himself or in copartnership with any other person or persons, carry on or exercise the practice or profession of a surgeon and apothecary, or either of them, either by residing or visiting any patient

date of the said indenture, were patients of the said Clarke and Rawlinson, for bills due from such persons for medicine

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within three miles of the present place of business of him the said J. Clarke in Park Street aforesaid. And further, that in case of any breach or non-performance of the covenant last hereinbefore contained, he the said J. Clarke, his heirs, executors, and administrators, shall and will pay unto the said E. A. Rawlinson, his executors, &c., the sum of £500, to be recovered against him the said J. Clarke, his heirs &c., by the said E. A. Rawlinson, as and for liquidated damages, and not as penalty; and further, that he the said J. Clarke shall and will, to the uttermost of his power, at all times from henceforth, introduce the said E. A. Rawlinson to his said profession or practice, and to the present patients of him the said J. Clarke, and, as far as practicable, to those who have hitherto employed him the said J. Clarke as such surgeon and apothecary, and shall and will do every reasonable act the said E. A. Rawlinson may deem necessary for the continuing and promoting the interest of the said concern. And further, that he the said J. Clarke shall, during the space of one year to be computed from the day of the date hereof, continue to reside in Park-street aforesaid, and to carry on and attend to the said profession or practice as he has hitherto done, and as if these presents had not been made, after which said period he is to quit such practice entirely, according to the stipu-

lations to that effect hereinbefore mentioned. And further, that he the said J. Clarke, his executors, &c., shall not nor will at any time during the remainder of the term or time for which the said J. Clarke now holds a lease of his present residence in Park-street aforesaid, permit or suffer any surgeon, apothecary, chemist, or druggist (other than the said E. A. Rawlinson, his executors, &c.) to reside, practise, or carry on business therein. And the said E. A. Rawlinson, in consideration of the premises last aforesaid, hereby agrees to allow the said J. Clarke, during such period of one year, one moiety of the clear profits of the said concern, to be paid at the expiration thereof. And further, the said E. A. Rawlinson, for himself, his executors, &c., further agrees to and with the said J. Clarke, his executors, &c., that he, the said E. A. Rawlinson, his executors, &c., shall and will pay to the said J. Clarke, his executors, &c., the sum of 400*l.*, at the times and in the proportions hereinbefore in that behalf mentioned. And it is further agreed by and between the said parties hereto, that the drugs, stock in trade, utensils, and shop-fixtures of the said J. Clarke, now upon the premises in Park-street aforesaid, shall be forthwith valued by a competent person, to be named and agreed to by the said J. Clarke and E. A. Rawlinson in the usual way, and the amount shall be paid by the said E. A.

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and attendance furnished and bestowed to them respectively in the said business, so carried on during the first year as in the said indenture is mentioned and provided, no part of which sums of money has been paid by the said Clarke to the said Rawlinson; whereupon the Lord Chief Baron refused to admit any evidence of monies received by the said Clarke from the said patients, during the first year."

The defendant below excepted to the refusal of the learned Judge to receive the above evidence.

The jury found a verdict for the plaintiff below on all the issues, and the judgment was accordingly entered for him. On that judgment a writ of error was brought into this Court, and the case was now argued (*a*) by

*Watson*, for the plaintiff in error.—Two exceptions were taken and are to be considered in this case. First, to the ruling of the Lord Chief Baron, as to the horse and gig being part of the stock-in-trade; secondly, to the rejection of the evidence tendered under the plea of set-off.

1. The second breach alone is material with reference to this point. That breach is, for not paying the second moiety of the £190, at which the drugs, stock-in-trade, &c., were valued: and unless the horse and gig were in fact part of the stock-in-trade, they are not within the covenant. The fact of the parties having *agreed* to treat them as stock-in-trade does not alter the case; especially as it appears upon the record, that that agreement was come to after the valuation was completed, except as to the drugs.—On this part of the case, he cited *Littler v. Holland* (*b*),

Rawlinson, his executors, &c., to the said J. Clarke, his executors, &c., as follows, that is to say, one moiety thereof immediately the value of the said drugs, stock in trade, utensils, and fixtures shall be ascertained in manner aforesaid; and the other moiety there-

of at the expiration of such period of one year as aforesaid. In witness whereof, &c.

(*a*) Before *Tindal*, C. J., *Paterson*, J., *Cottman*, J., *Coleridge*, J., *Maule*, J., and *Erle*, J.

(*b*) 3 T. R. 590.

*Brown v. Goodman* (a), *Cook v. Jennings* (b), *Heard v. Wadham* (c), *Goss v. Lord Nugent* (d). [Erle, J. — Surely “stock-in-trade” may or may not include the horse and gig, according as the parties agree.] But even if they may be so treated, the horse and gig were not valued by Lahee, and his valuation is a condition precedent to the plaintiff’s right to recover. [Tindal, C. J.—We do not think that point is open to you; the exception is not pointed to it. All that is material on this issue is, whether the stock-in-trade was properly valued; if it was, the issue ought to be found for the plaintiff below.]

2. Then the second exception is, that the evidence of the money received by Clarke during the year ought to have been admitted under the plea of set-off. The effect of this deed was to transfer the business to Rawlinson immediately, a certain sum being allowed to Clarke during the year, by way of salary for his services in keeping the business together. And the circumstance that this sum is fixed at half the profits of that year does not constitute a partnership between the two. All the money received during the year belonged to Rawlinson; and therefore, all that Clarke received and did not pay over to Rawlinson ought to be taken in account against him. There is no breach alleging that Clarke has not been paid his moiety of the profits at the end of the year. [Erle, J.—No doubt you may assume, for the purpose of the argument, that he has been paid.] Then the argument on behalf of the defendant in error must be, that there was a partnership. But it is obvious that the parties never intended that Clarke should participate in any loss which might happen during the first year: and it is an indispensable condition of a partnership, that each of the parties shall be sharers in both the profits and the losses. This is no more than a pro-

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(a) 3 T R. 592, n.

(b) 7 T. R. 381.

(c) 1 East, 619.

(d) 5 B. & Adol. 58.

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vision for remunerating Clarke for the services to be rendered by him, the value of which is reasonably taken to be a moiety of the profits.—He cited *Hesketh v. Blanchard* (a), *Smith v. Watson* (b), and *Waugh v. Carver* (c).

*Crowder*, for the defendant in error.—This evidence was rightly rejected, it being the subject of an account in equity merely, and not of any legal demand. The true construction of the deed is, that during the first year Clarke was to act, not as *agent* for Rawlinson, paid by wages for his services, but as principal, jointly interested in the profits, and held out to the world as a partner; and this was a reservation made for the benefit of Rawlinson, as the purchaser of the business, in order the better to introduce him into it. With respect to the observation, that Clarke had no partnership in the losses, the answer is, that where a person is interested in the clear profits of a concern, he is of necessity interested also in the losses: Story on Partnership, s. 58. And the presumption is, that a person who receives a share of the profits of a trade, receives them in the character of a partner and not of a servant. The cases cited on the other side are distinguishable. The decision in *Hesketh v. Blanchard* has been doubted; see Collyer on Partnership, p. 60, (2nd ed.); Story on Partnership, s. 57. [*Maule, J.*—The Court do not seem to have said anything more in that case, than that there was no such partnership as would prevent an action from being brought.] In *Smith v. Watson* there was a distinct agreement that the share of the profits was to be received by the plaintiff as agent, and in lieu of brokerage. There may be a partnership in the *profits*, though there be none in the *property*, of a concern: Story on Partnership, s. 32; and if there is to be a partnership in the profits, it is not the less a partnership because one of them contributes

(a) 4 East, 144.

(b) 2 B. & C. 401.

(c) 2 H. Bl. 235.

nothing but his labour, *Id.*, s. 15; citing Pothier, *De Société*, n. 8, 9, 10. And, by special agreement, a partner may share in the profits and not be accountable for the losses, the profits being calculated after deducting the losses; so that if, on the dissolution of the partnership, the total profits exceed the total losses, the party shall take his share of the surplus; but if the total losses exceed the total profits, he shall not share the excess of loss. The maxim of the Roman law was in accordance with this view—"Neque enim lucrum intelligitur nisi omni damno deducto, neque damnum nisi omni lucro deducto" (a). And a partner who is, at the end of the year, entitled to a proportion of the *clear* profits, does so far necessarily share in the losses, because the clear profits can only be ascertained after taking an account. In order to exclude a partnership, there ought to be an express stipulation that the party is to fill the character of agent or servant only: *Ex parte Hamper* (b), *Knowles v. Haughton* (c), see 3 Kent's Commentaries, p. 27. [*Erle*, J.—The introducing Rawlinson into the business might make Clarke a partner quoad alios, but not necessarily so inter se. *Maule*, J.—Clarke may be entitled to an account at the end of the year, in order to ascertain the amount payable to him, but that does not shew that Rawlinson may not sue him for money had and received during the year. *Coleridge*, J.—If at the end of the year bad debts were calculated, and the result taken of the profits, and Rawlinson were obliged to pay half of the whole, whether he had received them or not, that would be anything but a partnership.] It clearly is not necessary that the word *partnership* should be used in order to create that relation: *Cheap v. Cramond* (d).—He referred also to *Bond v. Pittard* (e) and *Dob v. Halsey* (f).

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(a) Donat., b. 1, tit. 8, s. 1, art. 7, 8, 9.

(b) 17 Ves. 404, 412.

(c) Collyer on Partnership, 22.

(d) 4 B. & Ald. 663.

(e) 3 M. & W. 357.

(f) 16 Johnson's American

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*Watson* was not called upon to reply.

TINDAL, C. J.—This action was brought by the plaintiff below against the defendant below, to recover £95, the residue of a valuation of drugs and stock in trade; in answer, the defendant below pleaded a set-off for money had and received by the plaintiff to the use of the defendant. The Chief Baron, who tried the cause, on evidence being offered that Clarke had received sums of money, as the defendant below contended, to his use, refused to receive such evidence, on the ground that the money so sought to be set off was due to both as partners, and that it could not be considered as money had and received to the use of the defendant below at all, until an account had been taken of the partnership funds. That is the question which we have to consider, and it depends on the proper construction of the deed entered into between the parties. It appears, that, by the deed, dated the 11th of May, 1843, Clarke sells his business to the defendant Rawlinson, and agrees to introduce him into the business, upon having a share of the profits of the first year; and it becomes extremely important to see whether the provisions of that deed are consistent with the existence of a partnership between the parties during the year. The deed first recites, that Clarke had agreed to sell, and Rawlinson to purchase, the business, on Clarke being paid £900, of which £500 was to be payable immediately, and the residue in equal moieties, on the 11th of November, 1843, and the 11th of May, 1844, and on Clarke entering into the covenants and agreements thereafter mentioned. All these payments had been made, except the moiety of £200, which was to be paid at the end of the year. Then Clarke, in consideration of this agreement, grants, bargains, sells, and assigns to Rawlinson “all the interest, benefit, &c., of him the said J. Clarke, to be from henceforth had, made, or obtained from the profession and practice so carried on, or of any of the patients now

or hereafter belonging thereto;" therefore, in its terms, the assignment of the business takes effect immediately from the execution of the deed; but it goes on to say,—and that is the only point as to which any question can arise,—“subject, as to one twelvemonth from the date hereof, to the stipulation or agreement hereinafter mentioned.” Now, looking at that stipulation, the effect of it seems to the Court to be only to make a certain allowance to Clarke during the first year, but not to give him any interest in the profits of the business during that time, so that the deed would still operate as an assignment of the whole of the profits from the day of its date, subject only to such stipulation as to the remuneration of Clarke for work and labour to be done by him. It then goes on with a covenant by Clarke, “that he will not, at any time hereafter, directly or indirectly, by himself or in copartnership with any other persons, carry on or exercise the practice or profession of a surgeon or apothecary, either by residing or visiting any patient within three miles from the present place of business in Park-street aforesaid;” and the contention on the part of the plaintiff is, that, notwithstanding these words, Clarke did not assign the business before the end of the first year, during which time he and Rawlinson were to be partners together. Now the effect of the deed being as I have before stated, we come to the stipulation following, that Clarke “shall and will, at all times from henceforth, to the utmost of his power, introduce Rawlinson to his said profession or practice, and to the present patients, and, as far as practicable, to those who have heretofore employed Clarke as surgeon and apothecary, and will do every reasonable act which Rawlinson shall deem necessary for continuing and promoting the interest of the concern; and shall, during one year, continue to reside in Park-street, and to carry on and attend to the profession or practice, as he has heretofore done; after which period he is to quit such practice entirely.” As far as one can see, the object was, that Clarke, without

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having any interest in the business, was, for the considerations he had received, to do all in his power, by appearing to continue in the business, to put Rawlinson in his stead. It then goes on with the stipulation excepted out of the granting part of the deed: "And the said Rawlinson, in consideration of the premises last aforesaid, agrees to allow to Clarke, during such period of one year, one moiety of the clear profits of the said concern, to be paid at the expiration thereof." Now the question is, whether, looking at the whole of this deed, it can bear any other construction than that Clarke was to receive nothing more than a salary for the services he was to afford to Rawlinson, in helping him to continue the business. It is observable, that in the granting part, nothing is said about a share of the profits; but, at the end of the deed, there is an agreement that the drugs, stock in trade, &c., are to be valued by a competent person, and the amount paid by Rawlinson to Clarke. Therefore this is as much a conveyance of the property in the stock in trade, as if there had been express words granting it in the deed; and the effect is, that, after the deed was executed, no property, either in the business, or the stock in trade, remained in Clarke, but all was given over to Rawlinson. If that is the case, it is very difficult to see how they can be called partners, where there is no joint interest in the matter in question. All the drugs then on the premises would probably soon be expended, and fresh ones supplied with the money which would be received from the patients, or with Rawlinson's own money; there is nothing to shew that Clarke was to put his hand in his pocket to supply drugs for the concern. That being the case, how can we say that the scope of this deed was to create a partnership? And when it was so obvious to use the word "partners," they would not have left it so much in doubt if the parties had intended that connexion to exist. It therefore seems to us, that when the money was received by Clarke from the patients, it became money had and received

to the use of Rawlinson, as much as if it had been put into a bag, or paid into a bankers, on his account. But it is said that this view imposes a hardship on Clarke, for it might be that he had received a large sum of money, no part of which he would be liable to refund to Rawlinson, as having been expended by him for the purposes of the business; if that were the case, it might be shewn that the money had been expended for the purpose for which the property was liable, and that either nothing of it was left, or, if anything were left, it was only what he had a right to appropriate to himself; but that would be a question for the jury, and ought, therefore, to have been submitted to them. However, on the principal question, it seems to us, that this was not money paid to one party, for which he was accountable as a partner, but money received to the use of the other party; and that the evidence ought to have been received, subject to the liability of its being rebutted by other evidence. The second exception, therefore, will be allowed. There was another exception, which we disposed of in the course of the argument.

Venire de novo.

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REPORTS OF CASES

ARGUED AND DETERMINED

IN

**The Courts of Exchequer**

AND

**Exchequer Chamber.**

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EASTER TERM, 9 VICTORIÆ.

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*April 15.*

RAWSTORNE and Others *v.* GANDELL and Another.

The Court will not set aside a plea of a release by one of several co-plaintiffs, unless it is clearly shewn to have been made in fraud of the other plaintiffs, or unless the releasor be a mere nominal party to the action, having no interest whatever in the subject-matter of it.

THIS was an action brought by the managing committee of the "Liverpool and Preston and North Union Railway," registered under the stat. 7 & 8 Vict. c. 110, to recover damages from the defendants, who were the engineers employed upon the line, for the non-performance of their contract to survey the line, and furnish plans and sections to be deposited in compliance with the standing orders of Parliament. The writ was issued in January 1846, issue was joined, and the cause was set down for trial at the Liverpool assizes, on the 21st March. On the evening of the 20th, the defendant's attorney withdrew the pleas then upon the record, and delivered a plea puis darrein continuance, of a release, jointly executed to the defendants by two of the

plaintiffs, named Duncan and Randall. The record was thereupon withdrawn.

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*Crompton* now moved for a rule, calling upon the defendants to shew cause why the plea of release should not be set aside, on the ground that it was pleaded by collusion between the plaintiffs Duncan and Randall and the defendants, and in fraud of the other plaintiffs. His affidavits stated the following facts:—After the failure in making the deposit of the plans, &c., to comply with the standing orders, the present proceedings against the defendants were resolved upon at a meeting of the shareholders; and the releasors, and all the original shareholders, had notice of that resolution. It was also resolved, that one guinea per share, on account of the deposit, should be returned to all shareholders desirous of giving up their shares. The releasor Duncan had been placed on the provisional committee through the influence of the defendants, but had never taken any active part in the management of the undertaking, and out of two hundred shares allotted to him, he had presented one hundred and fifty for the return of the guinea. After the present action was brought, Duncan and another of the plaintiffs, and two other persons, filed a bill in Chancery against all the other plaintiffs, to have the accounts taken under the authority of that court, and to restrain the present action. The defendants' attornies filed this bill, and also commenced a cross-action for an alleged balance due to the defendants. With respect to Randall, the other releasor, he had been on the managing committee, which was chosen from the provisional committee, but had never taken any active part in their proceedings. He had received back the guinea on all the shares allotted to him, and executed a deed, whereby, in consideration of that repayment, he did "release and for ever quit claim unto the provisional committee of the company, all and all manner of actions, suits, reckonings, claims, and demands, both at law and in equity,

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which he could, should, or might have against the said committee, by reason or on account of the said projected undertaking, or any transaction, matter, or thing, in anywise relating to the same, but subject to a rateable participation in any surplus fund."

*Crompton.*—This is a case involving considerations of very great importance. If any individual member of a managing committee of a railway has the power of extinguishing, by means like these, the claims of the shareholders against persons whose misconduct has occasioned the failure of the undertaking, the most mischievous consequences will follow. With respect to the releasor Randall, he had no beneficial interest whatever in the concern at the time of this release, but stood in the situation of a mere trustee; and a trustee will not be allowed to exercise his mere legal rights to bar those of others who are beneficially interested. And in *Phillips v. Clagett*(a), *Parke*, B., said: "Perhaps it may not be correct to say, that, in all cases in which a party has an interest, he *may* release. It is correct to say, that, if he has parted with all interest, he *cannot* release." But all the authorities shew, that where the release was fraudulent and colourable, the Court, in the exercise of its equitable jurisdiction, will set aside the plea; and here the facts disclosed in the affidavits manifestly shew that such was the case. It is plain enough, that Duncan was acting merely as the agent and for the benefit of the defendants. He retains, at all events, only a very small portion of his original interest in the concern; indeed, it is matter of inference only that he is still entitled to any shares. With respect to Randall, who has no interest whatever, the fraud is clear; and if it be established as to one of the releasors, as this is a joint release, the fraud vitiates it altogether. There is sufficient on

(a) 11 M. & W. 84.

the affidavits, at all events, to call upon these parties for an explanation of their acts.

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POLLOCK, C. B.—I think there should be no rule. One of these releasors, undoubtedly, had no interest which would entitle him to release the action; but the other had. No doubt this is the case of an exercise of a strict legal right, in a manner very mischievous and injurious to the other plaintiffs, and for which the parties may, perhaps, be responsible to another tribunal; but we have no power to interfere, if there be the smallest right or real interest on which the release may operate at law. If the plaintiff Duncan is not suing altogether on behalf of the other plaintiffs—if he be not a *mere name*—the release by him is effectual, and we ought not to interfere. A court of law has no machinery for working out the equities of these conflicting interests. In truth, this application is neither more nor less than a bill in equity, to discover whether Duncan is or is not still interested in the concern.

PARKE, B.—I am of the same opinion. The case of *Phillips v. Clagett*, which has been referred to by Mr. *Crompton*, lays down the rule of law on this subject. We cannot interfere to prevent the defendants from pleading this release, unless a clear case of fraud between them and the releasors, to the prejudice of their co-plaintiffs, be made out, or unless it be shewn that the release was executed by persons who were suing as mere trustees, having no real interest in the subject-matter of the action. But so long as a person has shares in such an undertaking, he has an interest, which, however small it be, is sufficient to enable him to release an action in which he is a plaintiff; and the case is quite different from the familiar one of assignor and assignee, in which the Courts for the first time interposed in this way. The plaintiff Duncan still holds fifty shares in this undertaking, and is therefore entitled at law to release

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the claim of the company, subject to his responsibility to his co-partners for so doing. It is not shewn upon these affidavits that he ever agreed with the other plaintiffs not to release the action; it is shewn, indeed, that he agreed that the demand should be enforced in his name, but that cannot prevent him from executing a release to the defendants, if he thinks fit. In the common case of two co-plaintiffs equally interested, if one of them thinks fit, out of pure friendship to the defendant, to release the action, the Court cannot, on that account, interfere to set the release aside. In the present case, it seems to me that Mr. *Crompton* has not made out such a case as to induce us, sitting in a court of law, to interfere by virtue of our equitable jurisdiction. His remedy is by a bill in equity.

ROLFE, B., and PLATT, B., concurred.

Rule refused.



April 18.

MITCHELL v. NEWHALL.

The defendant gave the plaintiff, a broker on the Stock Exchange, an order to purchase for him fifty shares in a foreign railway Company. At that time no shares of the Company were in the market, the foreign government not having yet authorised its establishment; but letters of allotment for shares were then, according to the evidence of persons on the Stock Exchange, commonly bought and sold in the market as shares. The plaintiff bought for the defendant a letter of allotment for fifty shares:—*Held*, that a jury might well find that this was a good execution of the order.

DEBT in the sum of £150, for the value of shares in the “Belgian Eastern Junction Railway Company,” and in 2*l.* 10*s.* for commission. Plea, *nunquam indebitatus*, and issue thereon.

At the trial, before *Pollock*, C. B., at the Sittings in London after Hilary Term, it appeared that the plaintiff, who was a stockbroker, had been employed by the defendant to purchase for him “fifty shares” in the above railway. The defendant was a stranger to the Stock Exchange. The plaintiff purchased for the defendant a *letter of allotment* for

shares were then, according to the evidence of persons on the Stock Exchange, commonly bought and sold in the market as shares. The plaintiff bought for the defendant a letter of allotment for fifty shares:—*Held*, that a jury might well find that this was a good execution of the order.

fifty shares, for which he paid £150. At the time of the purchase, there were no *shares*, properly so called, of this railway company in the market, nor could any be issued or transferred, until an "act of concession" for the establishment of the company should be granted by the Belgian Government. The secretary of the Stock Exchange, and other persons conversant with the business, stated that letters of allotment of this company were commonly bought and sold in the market as shares. The defendant refused to accept the letter of allotment, and thereupon this action was brought against him. The Lord Chief Baron left it to the jury to say what was the nature of the direction given by the defendant to the plaintiff; whether he was at once to purchase that which in the Stock Exchange passed for shares, namely, a letter of allotment, or whether he was to wait until shares were issued, before he executed the order. The jury found for the plaintiff.

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*Humfrey* now moved for a new trial, on the ground of misdirection. An order to a broker to purchase *shares* in a railway cannot be construed as an authority to purchase a mere letter of allotment, which may be of no value whatsoever, and which, at most, only gives the purchaser a contingent right to receive shares at some future period. This was an express and unambiguous order to buy shares, and is not to be qualified or explained away by evidence of some understanding existing respecting this railway company on the Stock Exchange, of which the defendant had no knowledge.

POLLOCK, C. B.—I think there ought to be no rule in this case. Persons who employ members of the Stock Exchange to transact business of this kind for them, must be bound by its rules, and therefore the defendant cannot avail himself of his supposed ignorance of the mode of business on the Stock Exchange. Here the secretary proved



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that letters of allotment were commonly bought and sold as shares in this company. The question was as to the nature of the authority given to the broker; he had received an order from the defendant to purchase for him something, and it was for the jury to say what.

ROLFE, B.—I am of the same opinion. It is clear that it was a question for the jury to determine whether the order to purchase had reference to that which alone could be bought at the time, or whether it was an order to purchase at a future time, when an act of the Belgian Government should have been passed, which would authorise the transfer of shares in this particular undertaking.

PLATT, B., concurred.

Rule refused.



April 18.

CROMER and Others v. CHURT.

Where a verdict was taken by consent for the plaintiff at Nisi Prius, subject to the certificate of a barrister, to be given in the following Michaelmas Term, with power to enlarge the time for making it; and he enlarged the time till the following Easter Term; and in the month of March gave his certificate, directing that the

verdict should stand for a smaller amount:—*Held*, that final judgment might be signed immediately on the entry of this verdict upon the postea, and that the plaintiff was not bound to wait until after the expiration of the four first days of Easter Term.

THIS cause came on for trial at the summer assizes in 1845, when a verdict was taken by consent for the plaintiffs, subject to the award or certificate of a barrister, to be made or given before the expiration of the first four days of the next Michaelmas Term, with power to enlarge the time for making his award or certificate. The arbitrator duly enlarged the time until the first day of this term, and on the 29th of March last he gave his certificate, thereby directing that the verdict should stand for a smaller amount than it was taken for at the trial. On the production of this certificate to the associate, he delivered the postea to the plaintiffs' attorney; and on the 7th of April the plaintiff signed final judgment.

*Jervis* had obtained a rule to shew cause why the judgment should not be set aside for irregularity, on the ground that the plaintiff was not entitled to sign judgment until the expiration of the four first days *of term* after the giving of the certificate.

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*Martin* and *Willes* now shewed cause.—By Reg. Gen. H. 2 Will. 4, No. 67, final judgment may be signed at any time after four days from the return day of the *distringas*. In point of form, therefore, this judgment is perfectly regular: *Ames v. Lettice* (a), *Mason v. Clarke* (b); and the only question is, whether the circumstance of the verdict having been finally entered in pursuance of the certificate of an arbitrator, given at a later period, makes any difference in the case. Now the verdict directed by the certificate is to be considered in all respects as the verdict of the jury, and may accordingly be immediately entered upon the record. The amount certified becomes the verdict of the jury, as given in Michaelmas Term. There is no case directly in point, but, by analogy, the practice and the cases favour the plaintiffs' view. In *Little v. Newton* (c), the cause and all matters in difference were referred by agreement; the award directed that the costs of the cause and of the award should be paid by the defendant; and the Court of Common Pleas held that the plaintiff was entitled to have these costs taxed at once, without waiting for the expiration of the time during which the defendant might move to set aside the award. In *Hobdell v. Miller* (d), an opinion was intimated inconsistent with the subsequent decision in *Little v. Newton*; but Mr. Serjt. *Manning*, in a note to the latter case (e), observes, "Neither of these cases was founded on the stat. 9 & 10 Will. 3, c. 15; and where the reference is

(a) 6 M. & W. 216

(b) 1 Dowl. P. C. 288.

(c) 1 Man. & G. 978.

(d) 2 Scott, N. R., 163.

(e) 1 Man. & G. 978.

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under the general authority of the Court at common law, there is no time absolutely fixed for moving to set aside the award, though it is usually required that the application be made within the statutable time;" and in another note he says (*a*), "It would be a novel objection to the issuing of a fieri facias on a judgment, that the twenty years allowed by 10 & 11 Will 3, c. 14, for bringing a writ of error on that judgment, had not elapsed."

*Jervis, contra*.—The arbitrator here had power, in the alternative, to award or to certify, and to enlarge the time for doing so. This latter power gave him, by implication, all the consequences of such a power; and it follows that the verdict cannot be considered as being given until it is entered on the record pursuant to the certificate ultimately given by him. No doubt the certificate is no more than an instruction to the officer to enter the verdict; and it is the same as if the jury had deliberated upon their verdict until after the return-day of the distringas. Suppose the cause were tried after the return-day of the distringas, and the jury deliberated until the next day; is the party in such a case to be deprived of the four days after verdict, in which to move to set it aside? It was decided, in *Cheetham v. Sturtevant* (*b*), that where a cause was tried in term by adjournment, the trial was regular, although the time for the return of the distringas had expired. Suppose the jury desired to have a view of the premises to which the action related, and agreed that they did not give their verdict until the next assizes; could the party sign judgment instantly? Or suppose the assizes run into the term, is not the losing party equally to have his four days for moving? *Little v. Newton* was the case of an *award*, which is quite different.

POLLOCK, C. B.—I am of opinion that this rule must be

(*a*) 1 Man. & G. 980.

(*b*) 12 M. & W. 515.

discharged. The question is shortly this, whether the verdict is to be considered as given at *Nisi Prius*, or at the time of the certificate. In point of *form*, it is clear it is a verdict given at the time when it is taken from the mouth of the foreman of the jury. It is taken subject to alteration; but when that alteration is made, it dates back to the time when it was taken. If it were otherwise, the plaintiff might in the meantime elect to be nonsuited, which it is clear he could not do. I know of no test that can be applied, which would lead us to any other conclusion than that, for all purposes of form, the verdict is given at *Nisi Prius*, when it is agreed upon, subject to subsequent alteration. Then, in substance, what reason is there for introducing any new rule from any supposed analogy? There is always a judge sitting, by application to whom any injustice may be prevented. It appears to me, therefore, that the verdict is to be considered as having been given at *Nisi Prius*; that what has since been done relates back to that time; and that the certificate was a mere completion of the verdict really delivered at *Nisi Prius*.

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ROLFE, B.—I am of the same opinion. When the verdict is reduced by the certificate of the arbitrator, it is the same as if it had originally been given for the sum he names. Suppose he thought the sum originally given the right sum; all then remains unaltered. If it is suggested that there is any hardship in the party's being deprived of his four days for moving, the answer is, that the parties have agreed to a state of things which shuts them out from that benefit, by agreeing that the arbitrator should certify within a certain time, but not at any particular moment; and, as my Lord has said, there is always a judge sitting, who will interfere if the special circumstances of the case require it.

PLATT, B.—There are several modes of proceeding on  
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this certificate: here the parties choose to proceed upon it as a verdict, with all its consequences. When is that verdict pronounced? When it appears by the record to have been; and we cannot go out of the record merely because, at the time it was in fact delivered, instructions were given to enter it in a particular manner. Nor is there any real hardship; because, as soon as notice of taxation is given, the party may apply to the equitable jurisdiction of a judge at chambers to restrain the proceedings. We must take it that the parties have agreed to the verdict with all its circumstances. Their consent gets rid of the analogy which has been drawn from the case of *Cheetham v. Sturtevant*.

Rule discharged.

*April 21.* HUTCHINSON v. THE MANCHESTER, BURY, and ROSSENDALE RAILWAY COMPANY.

A railway act provided, that in case of refusal by the

THIS was an action of debt, to recover from the Railway Company, under the 159th section of their act of Parliament, owners of lands required for the railway, to accept the purchase-money, or compensation awarded by a jury, &c., the money might be deposited in the Bank of England, to the credit of the parties interested in the lands, in the name of the Accountant-General of the Court of Chancery. The Company were prohibited from entering on lands without consent, till payment, or deposit in the Bank, of the purchase money or compensation. Another clause enacted, that if the Company should *wilfully* enter upon and take possession of any lands without consent, or without having made such payment or deposit, they should forfeit to the party in possession a penalty of £10, to be recovered before justices; and if they should, after conviction in such penalty, or after notice from the party in possession, continue in *unlawful possession* of such lands, they should be liable to forfeit £25 a day, to be recoverable by action: Proviso, that nothing therein contained should subject the Company to the payment of any such penalties as aforesaid, if they should *bonâ fide*, and without collusion, have paid *or deposited* the compensation agreed or awarded to be paid for such lands, to any person whom they might reasonably believe to be entitled to the lands, though he were not legally entitled thereto. The Company, *bonâ fide*, and without collusion, took possession of lands in respect of which compensation had been awarded by a jury under the act, after they had deposited the amount thereof in the Court of Chancery, to the credit of the plaintiff, the person in possession, but without having performed certain conditions precedent to their right so to deposit it, and retained such possession after notice:—*Held*, that they were protected by the proviso from liability to the penalty of £25 a day: *Held*, also, that the word “*wilfully*,” in the above clause, applied only to the first branch of it.

the 8 Vict. c. ix, penalties for unlawfully continuing in possession of land of the plaintiff. The act empowers the Company to enter upon and take lands for the purposes of the railway, subject as therein mentioned. By sect. 169, in case of difference as to the value of or interest in the lands, the amount of compensation to be paid to owners or persons interested is to be determined by a jury. By sect. 153, in case of refusal to accept the purchase-money or compensation, or of failure to make out a title to the lands, &c., the money may be deposited in the Bank of England, to the credit of the parties interested in the lands, in the name and with the privity of the Accountant-General of the Court of Chancery. Then sect. 158 provides, that the Company "shall not, except by consent of the owner and occupier, enter upon any lands which shall be required to be purchased or permanently used for the purposes of this act, until they shall either have paid to every party having an interest in such lands, or deposited in the Bank of England, in the manner herein mentioned, the purchase-money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein: Provided always, that, for the purposes merely of surveying and taking levels of such lands, it shall be lawful for the Company to enter upon the same without the previous consent of the owners, making compensation for any damage thereby occasioned to the owners or occupiers of such lands." Sect. 159 enacts, that, "if the Company, or any of their contractors, shall, except as aforesaid, *wilfully* enter upon and take possession of any lands which shall be required to be purchased or permanently used for the purposes of this act, without such consent as aforesaid, or without having made such payment *or deposit* as aforesaid, the Company shall forfeit to the party in possession of such lands the sum of £10, over and above the amount of any damage done to such lands by reason of such entry and taking possession as aforesaid; such penalty and damage respectively to be re-

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covered before two justices, &c.; and if the Company, or their contractors, shall, after conviction in such penalty, *or after notice from the party in possession of such lands, continue in unlawful possession of any such lands*, the Company shall be liable to forfeit the sum of £25, for every day they or their contractors shall so remain in possession as aforesaid, such penalty to be recoverable by the party in possession of lands, with full costs of suit, in any of the superior courts: Provided always, that nothing herein contained shall be held to subject the Company to the payment of any such penalties as aforesaid, if they shall *bonâ fide*, and without collusion, have paid or *deposited* the compensation agreed or awarded to be paid in respect of the said lands, to any person whom the Company may have reasonably believed to be entitled thereto, although such person may not have been legally entitled thereto."

At the trial of the cause, before *Coleridge, J.*, at the last assizes at Liverpool, it appeared that compensation had been awarded, by a jury summoned under the act, to the plaintiff, who was the lessee for years, under the Earl of Derby, of lands which were required by the Company for the purposes of the railway. The Company, without first calling upon the plaintiff to accept such compensation, or to make out a title to the lands, paid the money, under the advice of counsel, into the Bank of England, to the credit of the plaintiff, and took possession of the lands. The plaintiff brought an ejectment against them, and recovered in that action (*a*); but the Company subsequently tendered to the plaintiff the amount of the compensation-money, which he refused to accept, and thereupon they again paid it into the Bank to his credit, and retained possession of the lands notwithstanding after notice to deliver them up. The jury found that the defendants had acted *bonâ fide*, and without collusion; and the learned Judge, being of opinion that the

(*a*) See 14 M. & W. 787.

word "wilfully," in sect. 159, applied to the unlawfully continuing in possession after notice, as well as to the former branch of the clause, directed a verdict for the defendants. —On the 20th of April,

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*Knowles* moved for a new trial, on the ground of misdirection. The learned Judge was wrong in holding that the word "wilfully," in the first branch of the 159th section, applies to the whole clause. Two matters are separately provided against by that clause: first, the *wilfully entering upon* and taking possession of lands, without consent, or without having made such payment or deposit as is before mentioned, in which case the company are liable to forfeit to the party in possession a sum of £10 beyond the damage done, to be recovered before two justices; secondly, the continuing in *unlawful possession* of such lands, *after* such conviction, or after notice, which renders them liable to a penalty of £25 a day. Then the proviso at the end of the clause applies only to the particular case of adverse claimants. If the company act *bonâ fide*, and without collusion, in the case of conflicting claims, and really mistake the true owner, the proviso protects them. It applies only to cases of payment to a wrong party, not to the case of a payment into the Bank to the credit of the party who is the acknowledged owner of the land. But, even if the word "wilfully" is to be held to extend to the second class of penalties mentioned in the section, its legal meaning is no more than "purposely," without reference to *bona fides* or collusion: *Regina v. Price* (a). The defendants, therefore, were liable to the plaintiff in penalties for designedly continuing in unlawful possession of the land after notice, though they may have acted with good faith. A party who trespasses upon land after notice not to do so, is held to be a *wilful* trespasser within the meaning of the stat. 8 & 9 Will. 3, c. 11, s. 4.

(a) 2 Ad. & E. 727.



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POLLOCK, C. B.—We are all of opinion that the word “wilfully” does not override the whole of the 159th section, but applies only to the first part of it. With respect to the meaning of the proviso, we have at present considerable doubt. It is impossible to give it a strictly *grammatical* construction, for the word “deposited” stands alone, and unconnected with any thing else. We must, therefore, endeavour to ascertain the probable meaning of the Legislature. Now two of its objects are plain: first, to make the payment of the price of the land a condition precedent to the entry of the company upon it, with the view to protect the public from the grievous injuries they would sustain if the company were to take land without giving value for it; secondly, to protect the company in all cases in which they *bonâ fide* pay the price, or make the deposit before they take possession; and accordingly this proviso is inserted for their benefit; and whatever may be the meaning of the word “deposited,” I think it ought to extend to protect the company in a case like this, of an erroneous deposit, made *bonâ fide* and without collusion. We wish, however, to speak to the learned Judge who tried the cause before we give our judgment.

Cur. adv. vult.

POLLOCK, C. B., now said—We have conferred with my Brother *Coleridge* upon this case, and there will be no rule. We are all of opinion that the proviso in the 159th section cannot be read precisely as it stands. We must give it some sensible construction; and, so dealing with it, we are of opinion that the section does not apply in this case, the company having, *bonâ fide* and without collusion, deposited the purchase-money for the benefit of the plaintiff. Sections like this, which may be justly called a penal enactment, ought to be strictly construed; but a proviso, which has the effect of saving parties from the consequences of a penal enactment, should be liberally construed. It appears

to us that this case is not within the mischief which the Legislature intended to guard against, and that we ought so to read the 159th section as to bring the company, in this instance, within the protection of the proviso at the end of it.

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Rule refused.

GATHERCOLE, Clerk, v. MIALL.

April 23.

THIS was an action for a libel, published in a newspaper called "The Nonconformist," on the 7th of January, 1846. It was of great length, and, in the main part of it, had reference to circumstances connected with the establishment and management of a clothing society or club, established in the parish of Chatteris, in the Isle of Ely, (a large parish, containing about 5000 inhabitants), under the auspices of the plaintiff, the vicar of that parish; from the benefits of which it complained that Dissenters were excluded: and it also commented, with much freedom and severity, on certain topics introduced by the plaintiff into his sermons preached in the church of that parish, and

The conduct and management, by the clergyman of a parish, of a charitable society in the parish, from the benefits of which Dissenters are by his sanction excluded, is not the lawful subject of public comment, so as to excuse, under the plea of not guilty, the publication of untrue and injurious matter

respecting the clergyman in relation to the charity.

*Quære*, whether sermons preached in a church, but not published, are the lawful subject of such public comment.

In an action for a libel published in a newspaper, evidence that copies of the newspaper containing the libel have been gratuitously circulated in the plaintiff's neighbourhood, though they be not shewn to have been sent by the defendant, the publisher, is admissible to shew the extent of the circulation of the paper, and the consequent injury to the plaintiff.

It was sought to prove that one of such newspapers had been sent to a public reading-room in the plaintiff's parish, to which there were eighty subscribers. The president of the reading-room stated, that a newspaper, called the "Nonconformist," (which was the name of that published by the defendant), was gratuitously sent to the room; that, from the glance he had of it, he judged it contained the libel in question; that it remained there a fortnight, when it was taken away (as he supposed) and not returned; that he had searched the room for it, and believed it was lost.

*Held*, first, that this was sufficient evidence to shew that the newspaper sent to the reading-room was one of the copies of the defendant's newspaper containing the libel; secondly, that this was sufficient proof of its loss to make secondary evidence of its contents admissible.

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generally upon his conduct in respect of his preaching, and his management of the charities of the parish.

The defendant pleaded Not guilty.

At the trial, before *Parke*, B., at the last assizes at Cambridge, the plaintiff, after giving the statutory evidence of the publication of the newspaper, proposed to shew that the particular paper containing the libel had been industriously circulated among persons in the plaintiff's neighbourhood, not in the habit of generally taking it in. This evidence was objected to on behalf of the defendant. The learned Judge admitted it; thinking, that, although it was not admissible to aggravate the damages on the ground of *malice*, unless the act of so circulating the paper was traced to the defendant, it was admissible to shew the *actual extent* of the circulation of the libel, and the consequent injury to the plaintiff's character. Witnesses were then called, who spoke to their having received that particular number of "The Nonconformist" without having ordered it; but none of them were able to produce the copies they had so received, or to shew that they were lost; and the learned Judge thereupon rejected the evidence, and in summing up desired the jury to exclude it altogether from their consideration. A person of the name of Brookes was then called, who stated that he was the president of the Chatteris Literary Institution, which consisted of eighty members; that early in January last a number of "The Nonconformist" was brought to the institution, he did not know by whom, and left there gratuitously; that, about a fortnight afterwards, it was taken (as he supposed) out of the subscribers' room without his authority, and was never returned; that he had searched the room for it, but had not found it, and never knew who had it; and that he believed it was lost or destroyed. The learned Judge, under these circumstances, held that secondary evidence of the contents of the paper was admissible. The witness then stated, that he believed the paper he had spoken of to have been a copy of

that produced in evidence: he remembered that it was headed "The Nonconformist;" and, so far as he could judge from a glance at it at the time, it contained the libellous article in question. The witness was not cross-examined as to his means of knowledge of the identity of the paper, his evidence being objected to as inadmissible altogether; but the learned Judge, for the reason before stated, held it to be admissible. The counsel for the defendant, *Byles*, Serjt., then addressed the jury; and during his address, when contending for the right of an editor of a newspaper, or any other person, to comment upon the sermons and tone of preaching, and the principles on which charities were administered in the parish of Chatteris, as being subjects open to public criticism, *Parke*, B., interposed, and intimated his opinion to be, that "every one has a right to comment upon public acts of public servants,—ministers, generals, judges; but not on the *unpublished* sermon of a clergyman: and that a sermon, preached by a clergyman to his parishioners, is strictly a private matter, and not the subject of remark."

No evidence was offered for the defendant; and the learned Judge, in summing up, directed the jury in the following terms:—"That a libel is anything written or printed, which from its terms is calculated to injure the character of another, by bringing him into hatred, contempt, or ridicule, and which is published without lawful justification or excuse. That, in an action for libel, the defendant may plead and prove the truth of it, or he may shew, under the plea of not guilty, that it was published on some occasion which excused it. That every one has a right to comment on public acts of public servants, ministers, generals, judges; that they furnished a lawful occasion for publication; but he thought not on a sermon preached by a clergyman to his parishioners, unless he published it, and therefore offered it as a subject for general criticism, like

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any other literary work; that it was however quite unnecessary to offer any opinion on that, because there was no evidence at all of any sermon which was the subject of this comment. That rules which a clergyman or any other man makes for the conduct of a charity which he establishes, are not thereby made a subject for public comment. That no part of the libel was a comment on anything which is public property, and on which the defendant had a right to comment as such." He then left it to the jury to say, first, whether they thought the imputations in the libel were calculated to bring the plaintiff's character into contempt or not; and secondly, if they were, what was a fair amount of damages. The jury found for the plaintiff, damages £200.

Sir *Thomas Wilde*, Serjt., now moved for a new trial, on the ground of the improper reception of evidence, and of misdirection. First, there was no sufficient evidence of the loss of the paper brought to the Chatteris Literary Institution, to make Brookes' evidence of its contents admissible. This was a room frequented only by the subscribers of the Institution, limited in number; and it does not appear how many or how few were in the habit of visiting it about that time. Some inquiry should have been made amongst them, or at least from the proprietor of the rooms. It is not like the case of a public coffee-room, to which any number of strangers may resort. [*Alderson*, B.—This is not the case of a *title-deed*, but of an old newspaper. Suppose it had been the back of a letter, must you ask eighty persons whether they have taken it?] No doubt the nature and quality of the document is to be considered; but so also must the importance of the occasion on which the evidence is offered. If a man were on trial for his life, would a judge have admitted secondary evidence of a treasonable paper on such evidence as this? and yet, of course, the

rule of evidence must be just the same in an action for libel as upon an indictment for high treason. What reason was there for believing that this paper was, in fact, lost or destroyed? The greater probability was, that, if it contained such an article, it was taken away to be preserved.

Secondly, there was no sufficient evidence to go to the jury, that the paper left at the Literary Institution was a copy of the particular number of the "Nonconformist" which contained the libel. All that the witness said was, that it was headed "The Nonconformist;" and, from a glance at it, that he judged it contained the libellous article. That does not shew that it was a Nonconformist newspaper purporting to be published by the defendant. The mere fact of the heading being the same can be no evidence against him as the publisher. [*Pollock*, C. B.—You have, besides, the opinion of the witness that it was the same paper. Besides, there was no cross-examination as to its contents; it was almost taken for granted that it was the same paper.] It was received as evidence of the contents of a paper published by the defendant. [*Parke*, B.—Rather as evidence of the copy of a newspaper of which he is proved by the regular statutory evidence to be the printer and publisher.] The object being to shew a circulation of the paper at a particular place, in order to influence the damages, the evidence given in this case will not bear the test of legal examination.

Thirdly, this particular paper was not at all shewn to have been sent to the Institution by the defendant, and may have been brought there by some person altogether unconnected with him; it was, therefore, wrongly received as evidence of the extent of the damage done by him. The *extended* circulation is not his act: the injury consequent upon it is not attributable to him. The party who brought it there is the party responsible for any damage the plaintiff received by *that act*. [*Parke*, B.—Suppose the plaintiff

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published a thousand copies, and one were to find its way, by the hand of a third person, to the reading-room of a debating society, would not that be evidence to shew the extent of the mischief done by the publication to the plaintiff's character?] Then, if that be so, if a man writes and publishes a libel to A., he is responsible for all the damage that may arise by the exhibition of that libel by A. to B., by B. to C., and so on to the end of the alphabet. [*Parke, B.*—My observation refers only to the case of a newspaper, which is published expressly for general circulation. Surely the proprietor of a newspaper, with a very large circulation, is to be visited with larger damages for a libel published in it, than one of more limited circulation.]

The next question arises upon the direction of the learned Judge to the jury. And first, with respect to that part of the libel which comments upon the plaintiff's mode of *preaching*, the observation of the learned Judge, during the address of the defendant's counsel to the jury, was calculated to influence him in the defence he might make by evidence, and in that view had an important bearing on the issue of the cause. It may have been, that by reason of that very observation no evidence was given of any sermon preached by the plaintiff. [*Pollock, C. B.*—I think it would lead to endless confusion, if we were to grant a new trial merely because the Judge, in the course of the cause, had made some general observation on a point of law, which might turn out to be wrong, unless it be shewn that it had some practical influence on the trial.] It is sufficient that it governed the conduct and limited the discretion of the counsel in the cause. Now, the doctrine that a sermon, preached in a parish church, cannot be made the subject of public remark, is incorrect, and cannot be maintained. [*Parke, B.*—Can you put it in the same position as if it were published for the use of the world?] It is submitted that there is no distinction in this respect. The preached

sermon is published to all who resort to the church. [*Parke, B.*—I did not lay it down conclusively, that a preached sermon, as contra-distinguished from a printed and published sermon, was not the subject of comment, in such a way as to prevent the defendant's counsel from offering a sermon in evidence, if he had wished to do so. I did not express a positive opinion on the point at all.]

Next, as to that part of the libel which related to the conduct of the charity. [The learned Judge misdirected the jury, in telling them that this was no legitimate subject of remark. The principles on which charities are conducted are of great importance to the public, and it is very fit they should be the subject of public discussion, when couched in proper language. This is not like the case of a few persons meeting together for the purpose of a private charity; it appeared that Chatteris was a large parish, containing five thousand inhabitants, among whom there was a considerable proportion of dissenters. It was a charity presided over by the clergyman of that parish; and the resolutions of the charity convey an imputation upon those who dissent from the Establishment, by representing them as persons unworthy to be the objects of benevolence. [*Pollock, C. B.*—You truly say, that the public have a deep interest in the diffusion of charity; so they have in the diffusion of knowledge: but could you say, if a book-club were established, with regulations excluding persons of certain opinions, they could be made the subject of public criticism, which might be neither right as to its facts, nor just in its judgment?] The true principle is, whether the public have a real interest in the matter. A charity distributed among five thousand persons cannot be considered in the same light as a private book-club. If the mode of dispensing this charity, in so large a parish, was, as undoubtedly it was, a matter in which the public of Chatteris had an interest, that public was sufficiently large to give a just right of criticism on its

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objects and management. The soliciting persons to join in a charity, conducted on such narrow and exclusive principles, is a matter which ought, for the public good, to be prevented, and which any one of the public has an interest to prevent, by an appeal to the general good sense and just feeling of his fellow-citizens. No doubt, if the defendant, or any other person, in doing so, exceeds the just limits of public comment, he may be liable to an action; but this verdict has been given on the principle that the defendant had no right at all publicly to discuss these subjects. The defendant ought therefore to have a new trial, that the matter may be presented to the jury with that limitation.

PARKE, B.—With respect to the evidence admitted, the case stood thus:—When another copy of the newspaper was offered in evidence (it having been suggested in the opening of Mr. *Gunning* for the plaintiff, that many of them had been industriously circulated in the neighbourhood of Chatteris, and given to persons who did not subscribe to the Nonconformist newspaper), I said, “Do you propose to affect the defendant with the actual sending of this paper to that particular place?” If the plaintiff could not do that, then, I said, the evidence was inadmissible to aggravate the damages on the ground of malice, but that I should receive it as proof of the circulation of the newspaper. Then Mr. Fryar, the first witness, was called, for the purpose of proving the fact of the newspaper having been sent to him by some unknown person: it turned out that he had left the newspaper at home. Then (doubting, however, in my own mind whether I was not rather too strict) I said, “I cannot receive evidence of its contents; you had better abandon that head of evidence.” Accordingly, in Mr. Fryar’s case it was given up. Then the plaintiff’s counsel made a second effort to shew that this gratuitous circulation had taken place; and they proved that by the circumstance of

its having been sent to the public reading-room at Chatteris; and then, upon proof of the loss of the newspaper, satisfactory to my mind, considering the nature of newspapers, I admitted secondary evidence of its contents. The secondary evidence given was this:—There was general evidence that it was a paper called the Nonconformist, containing, according to the best of the witness's recollection, the libel, the subject of this action. I thought that was ample evidence to shew that one of the copies of the newspaper, of which the defendant was the publisher, and of which, of course, he did not print one copy, but many, had been sent by some person, not the defendant, to that room; then I thought that was admissible evidence to shew the extent of damage. If I was wrong in that respect, there ought, of course, to be a rule. But I conceive, that if any person, not the editor of the Times newspaper, sends the Times paper, published for the purpose of general circulation, to particular individuals, and those individuals read it, (of course, assuming that the article is likely to make an impression prejudicial to the plaintiff), that is a circumstance that may be taken into consideration in aggravation of damages, in an action against the publisher of that paper. It struck me then, and strikes me now, that there was ample evidence of one of the prints of the Nonconformist newspaper, one of the impressions published by the defendant, having found its way into the hands of third persons in the reading-room at Chatteris. I did not receive the evidence on the ground that the defendant was thereby proved to have been industriously circulating the newspaper, and so to aggravate the damages against him, as being actuated by private spleen or malice, but that this was to be considered as proof that the papers were in more extensive circulation, by the single fact of its being left in the Chatteris reading-room.

Then, with regard to the rest of the case, certainly I interrupted my Brother *Byles*, making a remark, as my

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Brother *Wilde* has stated, with respect to the right of comment on unpublished sermons; but I never meant to bind myself by that opinion. I had a strong opinion on the subject, I own, and I retain that opinion still; but when the case was closed—my previous remarks being made for the purpose of shortening any long observations that might be made upon that subject—when the case came to its close, I expressed no opinion as to the sermons. I said it was unnecessary to decide the point, because there was no proof of any sermon, that could furnish a lawful occasion for those remarks. And with regard to the parochial subscription set on foot by the clergyman, I thought the clergyman, in so doing, did not thereby make that act the subject of comment, and give a lawful occasion for everybody to remark upon it, in the same way that he would if he were publishing a literary work, and presenting it to the public. Nor was his act a *public* act, in the same sense as the act of a magistrate in the administration of justice, or of a general in conducting an army, or any public officer in exercising for the benefit of the public an office in the state. The position such a party is in gives occasion to all the public to make remarks on his conduct; and if those remarks are made in a fair spirit, they are justifiable under the general issue. But it seemed to me that there was no occasion, in the fact of a man's making a regulation for his own parish, which could furnish a lawful excuse for the publication of these remarks.

I have stated the view I took of this case at the trial: my learned Brothers will now say whether I was right or wrong.

POLLOCK, C. B.—We are all agreed that there should be no rule in this case. The rule has been moved for on two grounds: first, the reception of evidence which ought not to have been received; and secondly, upon the ground of misdirection. The first ground appears to have been

taken upon this state of things:—The defendant was proved to be the publisher of a newspaper called the “Nonconformist.” One paper was produced, containing the libel complained of; and it was proposed to prove that other copies had been in circulation, not with any view to shew malice on the part of the defendant, because for that purpose a publication specially by him, at the place where they were found, probably ought to have been proved, but with a view to shew the extent of the mischief that might have been done to the plaintiff, who complained of this wrong. Several witnesses appear to have been examined up to the point of not being able to prove the paper, and then they were not allowed to proceed in their evidence; and no stress at all appears to have been laid upon any cases, except where a paper was mislaid or lost, and evidence given of its contents. With respect to the witness Brookes, he appears to have seen a paper, which he took upon himself to say was one of the copies of the “Nonconformist” complained of as having contained the libel. I think this must have been understood by the learned Judge, by the counsel, and by the jury, to be the effect of his evidence. Whatever terms were used, it must be understood that he meant to say that he saw a paper, which, upon some ground more or less clear and positive, he believed to be a copy of this number of the “Nonconformist.” Now this evidence is complained of upon three grounds: First, that there was no evidence that the paper was lost. Now it seems to me, that the evidence of a document being lost, upon which secondary evidence may be given of its contents, may vary much, according to the nature of the paper itself, the custody it is in, and, indeed, all the surrounding circumstances of the particular matter before the court and jury. A paper of considerable importance, which is not likely to be permitted to perish, may call for a much more minute and accurate search than that which may be considered as waste paper, which nobody would be likely to take care of, and which might,

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I think, be considered as lost, so as not to be produced before a court and jury, when, after search, in the first instance, at the place where it was likely to be found, it is not discovered there, and we cannot suggest any one place where it is more likely to be than another. Here search was made in the room where the paper ought to be: if the paper be not there, is inquiry to be made of all the persons who frequent that place? Here the club, or reading society, consisted of eighty persons. It might have consisted of 800; nay, it might have been a reading-room accessible to many thousands of persons. What inquiry will do? I think, in cases of this sort, if, some time after its publication, a newspaper, which, except occasionally for the purpose of filing, is not very much considered a few days after its publication, is not found in the place where it ought to be, if it be anywhere, no search is necessary among members of the club, or persons who frequent the club-room: it may be taken to be lost, if it cannot be produced from the spot where it ought to be found. But then, it is said that this paper is not proved to have been issued by the defendant: that is a question entirely for the jury; and I think there is evidence to prove that this was one of the copies printed at the same time with the libel which is laid before the jury. It is not like the publication of a written libel. The jury must be aware that many copies of a newspaper are issued at the same time; and they are issued for the purpose of publication and distribution. No doubt a suggestion may be made, that the plaintiff, in order to enhance the damages, may have procured some papers to be printed. The jury are to consider whether that is a reasonable suggestion or not. There was some evidence for the jury to consider: and, I think the reasonable conclusion is, that this paper was originally issued by the defendant; that is, that it was probably issued as a newspaper to some newsman, and by the newsman sent down to the place where it was seen; and it appears to me that the defendant

was responsible for that, without at all entering into some of the questions which arose in the course of the argument, and for every one of which one might not possibly be able to give so satisfactory an answer. But I understood my Brother *Wilde* to make a third case: that it was not issued by him in such a way as to entitle the plaintiff to give it in evidence against him to increase the damages. Now, it appears to have been issued as newspapers generally are, for the purpose of being circulated; and I think, in order to shew the extent of the mischief that may have been done to the plaintiff by a libel in a newspaper, you have a right to give evidence of any place where any copy of that libel has appeared, for the purpose of shewing the extent of the circulation. It seems to me, therefore, in the first place, that due inquiry had been made, and there was reasonable evidence that the paper could not have been found by any search any person could reasonably be called upon to make; that, in the next place, there was evidence to go to the jury that that paper, so lost and so identified, had been issued by the defendant; and, being issued by the defendant, wherever it is traced and found, it is for the jury to consider the effect of that, as tending to shew, as such evidence does, that there has been a publication beyond the mere publication the plaintiff complains of, and gives in evidence as the libel which is the subject of the action. Upon the whole, it seems to me that there is no foundation whatever for granting the rule, on the ground that evidence was received which it was not competent for the learned Judge to admit.

The other ground on which the application for a new trial is made, is a misdirection in point of law. It is objected that the learned Judge laid down the same rule with reference to sermons that were preached, and to the rules of the charity that was administered in the parish of Chatteris, as applied to private conversations, or to private acts of charity; and it is contended that he ought to have laid it down, that a sermon, preached but not published, was the

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subject of criticism in the enlarged style of commentary which that word seems to introduce, according to the decided cases; and that the conduct of the clergyman with reference to the parish charity, and especially the rules of it, justified any *bonâ fide* remarks, whether founded in truth in point of fact, or justice in point of commentary, provided only they were an honest and *bonâ fide* comment; and that this might be shewn under the general issue. There can be no doubt, if it might be shewn at all, it might be shewn under the general issue.

My Brother *Wilde* urged upon the Court the importance of this question; and I own I think it is a question of very grave and deep importance. He pressed upon us, that wherever the public had an interest in such a discussion, the law ought to protect it, and work out the public good, by permitting public opinion, through the medium of the public press, to operate upon such transactions. I am not sure that so extended a rule is at all necessary to the public good. I do not in any degree complain, on the contrary I think it quite right, that all matters that are entirely of a public nature;—conduct of ministers, conduct of Judges—the proceedings of all persons who are responsible to the public at large, are deemed to be public property; and that all *bonâ fide* and honest remarks upon *such* persons, and their conduct, may be made with perfect freedom, and without being questioned too nicely for either truth or justice; but, when the public interest is pressed upon our attention, if it is for the purpose of introducing any new rule, or extending those doctrines to any point beyond that to which they have hitherto been extended, it appears to me to be a sufficient answer to say, if the public is interested in the administration of charity, if it be of importance that the doctrine of “doing good to all men” should be preached, and not only be preached, but that every one should act upon that doctrine, that would be abundantly satisfied by those who comment on these matters only exercising the ordi-

nary right that they have at the common law, and that is, that they may comment upon anything, only let truth be the basis of their observations, and let the superstructure be justice: if truth be the foundation, and justice be the superstructure, it appears to me that that will work out all the ends of public good that can be required for any such purposes as my Brother *Wilde* refers to. Now, with reference to the application of this doctrine to the case before us, there are two points to be considered:—the one as to the sermons, the other as to the parish charity. My opinion goes entirely along with the intimation of opinion that fell from my Brother *Parke* at the trial; I think a sermon preached to a congregation may undoubtedly be made the subject of a comment, but you must not put into the mouth of the pastor language that he did not use, or make any comment upon what he did use, or was supposed to use, that does not fairly arise out of the truth. I think you are fettered, with respect to a sermon preached to a congregation, just as you would be fettered with respect to any other matter on which you have a right to comment, but on which you must comment with truth and with justice. It appears, however, from the report of my learned Brother *Parke*, that he did not exclude any evidence in respect to a sermon; and in the course of the conduct of the cause, and finally, in summing up, he pointedly called the attention of the learned counsel, that with respect to that part of the case, it was unnecessary to give any opinion upon the point, because there was no sermon in evidence to which those comments could possibly apply. Therefore, although entirely agreeing with him in the opinion he intimated in the course of his summing up the case, I think this is quite sufficient reason to refuse the rule upon this ground.

With respect to the rules of the charity, I think that a parochial charity, with the vicar at the head of it, among other persons in the parish, not for parochial purposes, but for some exclusive purpose, with reference either to reli-

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gious opinion or to any thing else, is a private matter, and is not open to what may be called *licentious* comment, as opposed to a comment that must be based in truth. It really seems to me that licentious comments cannot be applied to a case of this sort, without extending such comments to almost every transaction in society. With respect to the rules that have hitherto been laid down in the case of criticism on works published, it has been held that they invite that criticism; they are held out for an examination, and from the acknowledged usages of society, every man who publishes a book invites criticism. Whether that would apply to a book not published, but printed for circulation among friends, may be doubtful; it is not necessary to follow that up; I think it may be reasonably doubted. In the present case the question is, whether a parochial charity, with the vicar at the head of it, that is, a charity confined to certain persons within a parish, may be made the subject of a licentious comment. I own I think that every purpose of public good would be answered by strictly confining it to the privilege that every man has of publishing that which is true, and saying that which the truth will warrant; and that it is not at all necessary, in a case of this sort, to give him any power, either licentiously or with honest prejudices, to invent for himself, or to misrepresent and comment upon, matters that do not exist in point of fact, however honestly.

Some observations have been made in the course of the argument, with reference to there being no evidence actually tendered. I entirely agree, that whenever there is reason to think that the course of any cause has been so altered by the ruling of a Judge in that cause, that justice has not been done, that is a ground for coming to the Court for redress. And it may not be necessary for counsel distinctly to point out in what manner the mischief has been done, if the Court clearly perceives that what has occurred would lead to that mischief. I therefore entertain the ap-

plication of my Brother *Wilde* in the full spirit in which it was made ; and I say this the rather, because, during one part of his argument, it might be inferred that I thought he was not exactly *rectus in curiâ*, so as to make the application at all ; but, entertaining the application, and entertaining it with the respect that is due to him, and with the responsibility that belongs to the question,—undoubtedly, I admit, of some importance,—I yet, upon all the points that have been presented to my mind, am so free from doubt, that I think no rule ought to be granted in this case.

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ALDERSON, B.—I am of the same opinion, that there should be no rule in this case. At the same time, I am by no means prepared to say, that if it had depended upon the question as to the sermons, I should not have been in favour of granting a rule, as I by no means entertain a decided opinion upon that point. The two points in question on which this rule has been applied for, are, first, the improper admission of evidence ; secondly, misdirection. I shall say very shortly what I think as to the admission of the evidence. It is clear, as it seems to me, that the evidence was properly received. I think the search should be such as should induce the judge to come to the conclusion, and the Court afterwards, on revising his opinion, to come to the same conclusion, that there is no reason to suppose that the omission to produce the document itself arose from any desire of keeping it back, and that there has been no reasonable opportunity of producing it which has been neglected. Now, the question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for ; and I put the case, in the course of the argument, of the back of a letter. It is quite clear a very slender search would be sufficient to shew that a document of that description had been lost. If we were speaking of an envelope, in which a letter had been received, and a person said, “ I have search-

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ed for it among my papers, I cannot find it," surely that would be sufficient. So, with respect to an old newspaper which has been at a public coffee-room; if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposes it has been taken away by some one, that seems to me to be amply sufficient. If he had said, "I know it was taken away by A. B.," then I should have said, you ought to go to A. B., and see if A. B. has not got that which it is proved he took away; but if you have no proof that it was taken away by any individual at all, it seems to me to be a very unreasonable thing to require that you should go to all the members of the club, for the purpose of asking one more than another, whether he has taken it away, or kept it. I do not know where it would stop; when you once go to each of the members, then you must ask each of the servants, or wives, or children of the members; and where will you stop? As it seems to me, the proper limit is, where a reasonable person would be satisfied that they had bonâ fide endeavoured to produce the document itself; and therefore I think it was reasonable to receive parol evidence of the contents of this newspaper. Then, was the parol evidence of the contents of the paper such as might reasonably be received as against the present defendant? It is clear that there is no evidence whatever to shew that this paper, or these papers, have been sent by the defendant individually, from any personal malicious motives. It would be absurd to put it upon that; and if it had been so put, it would have been a misdirection upon that ground. The question is, whether or not there is reasonable evidence that this is a copy of the individual paper which has been produced, and which has been shewn to have been published by the defendant. Now we must consider what the nature of the instrument is. It is a copy of a newspaper. We must use our own common sense, and remember that, with respect to newspapers, not

one copy, but a great variety of copies, are published for general circulation among the public at large. If you compare an instrument in one or two parts, and find the one is an exact copy of the other, you would have no difficulty in saying it was printed from the same materials, and from the same type. Suppose I were to have a copy of Meeson and Welsby's Reports here, and Meeson and Welsby's Reports in the Queen's Bench, and Meeson and Welsby's Reports in the Common Pleas, and I were to examine those three books, and to find that there was a misprint in the first page, and a misprint in the fortieth page, and a misprint in the sixty-third page, I should say a jury might very reasonably infer that those three books were printed from the same types. So I say here with respect to a newspaper; if you find it in general corresponds, it is evidence from which the jury may infer that the paper is printed from the same type as the paper which is produced; and if so, it is printed by the defendant; and if so, the defendant is responsible for the extent of injury which may be done by that paper, which by some means has come out of his possession, and which the jury may infer that he, or somebody connected with him, was the person who transmitted to the Chatteris Book Society. It seems to me that it was evidence, and evidence on which the plaintiff might reasonably rely, for the purpose of shewing that the injury which the defendant had done him by printing the newspaper, was aggravated by the circumstance that there was a paper here, and a paper there, and a paper in places in which it might do him an injury among those who live around him, all which was owing to the original publication by the defendant of the libel. It seems, therefore, to me, that that evidence was properly received.

Then the question is, whether or not there was a misdirection. Now, if my Brother *Parke* had told the jury, that, to observe upon the sermon of a clergyman, which he preaches openly in his pulpit, was not within the general

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rule which enables parties to comment more liberally on the public conduct of individuals than on their private conduct, I, for one, should have desired that the question should be further considered. I do not say that I should not ultimately,—possibly I should,—have come to the same conclusion to which my Lord Chief Baron has arrived, and which was intimated by my Brother *Parke* as the impression which he had at the time of the trial, and which he retains now. I only mean to guard myself against being supposed to have formed a decided opinion upon that point at the present moment. It seems there is a distinction, although I must say I really can hardly tell what the limits of it are, between the comments on a man's public conduct and upon his private conduct. I can understand that you have a right to comment on the public acts of a minister, upon the public acts of a general, upon the public judgments of a judge, upon the public skill of an actor,—I can understand that; but, I do not know where the limit can be drawn distinctly, between where the comment is to cease, as being applied solely to a man's public conduct, and where it is to begin, as applicable to his private character; because, although it is quite competent for a person to speak of a judgment of a judge, as being an extremely erroneous and foolish one, (and no doubt comments of that sort have great tendency to make persons careful of what they say), and although it is perfectly competent for persons to say of an actor, that he is a remarkably bad actor, and ought not to be permitted to perform such and such parts, because he performs them so ill, yet you ought not to be allowed to say of an actor that he has disgraced himself in private life; nor to say of a judge, or of a minister, that he has committed felony, or any thing of that description, which is in no way connected with his public conduct or public judgment; and therefore there must be some limits, although I do not distinctly see exactly where those limits are to be drawn. No doubt, if there are such limits, my

Brother *Wilde* is perfectly right in saying, that the only ground on which the verdict and damages can go, is for the excess, and not for the lawful exercise, of the criticism: and it is for that reason that I doubt, whether you may not properly criticise a gentleman's sermons, by saying "he is a remarkably bad preacher." Possibly you may speak of him, also, as preaching erroneous doctrines, although about that there may be more doubt; seeing that there is a tribunal to which you may refer any erroneous doctrine which he may preach in the pulpit: but with respect to the stupidity or the dulness of his sermon, there is no redress except by public observation; and I am by no means prepared to say you may not criticise them justly and fairly; and if you criticise *bonâ fide*, even although the man sustains an injury from your criticism, it is an injury for which there is no redress at law by damages. But, with respect to the present question, my Brother *Parke* has not laid it down to the jury that the sermons were not, or might not be, the subject of proper criticism. No sermons were proved; probably none were capable of being proved, of which this could be considered in the light of fair criticism: indeed I must say, that I think it would be a libel on criticism, to call this criticism on any man's sermon. Now this gentleman, in his ministerial and public capacity, preaches his sermons, and it is because he does so in his ministerial and public capacity, that I entertain a doubt whether it is not part of his public character. He is, as a clergyman, bound to preach the sermons in his ministerial and public capacity; and it may be, that that is within the limits of the ordinary rule which governs the criticism upon public acts of individuals. But what has his private charity, in the parish of Chatteris, or any where else, to do with that? How does that differ from the private charity of any other individual? It is no part of his peculiar ministerial duty to have a clothing club, though it is a very proper thing for him or any other charitable man

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to do. I am at a loss to see how his case differs from that of any other individual who chooses to institute a private charity within particular limits. If so, then the criticism and observations that are to be made upon him, are the criticism and observations which are to be made upon any other private individual, and are to be judged by the same rules, and subject to the same limits; and that is what my Brother *Parke* laid down; not that you may not comment—God forbid you should not be allowed to comment—on the acts of all mankind, provided you do it justly and truly; but that your comments upon Mr. Gathercole, in the institution of private charities, which Mr. Gathercole chooses to patronise, are to be judged in the same manner as comments on the private conduct of any other individual in his private charities, and that he is for that purpose in the same situation as any other private individual. It is no part of his public duty, no part of his public conduct, that is the subject of comment in that respect. Therefore it is that I think my Brother *Parke* laid down the right rule. Whether or not this is a libel is not the question before us; there is no doubt about that; the jury have found it to be so, and it seems to me, so far as these charges are concerned, that it is a libel to be governed by the same rules which govern a libel on any other private individual. I do not mean to say what the exact limits are of public and of private libels, but my judgment proceeds upon the ground, that this is in the same situation as a libel on any other private individual.

ROLFE, B.—I am entirely of the same opinion; and with reference to the first point, namely, the reception of evidence, I will content myself with silently acquiescing, because my Lord Chief Baron and my Brother *Alderson* have stated the grounds of my opinion so fully, that it would be mere pedantry to put the same proposition into different language. With regard to the other, which is the main

point, whether there was a misdirection on the part of my Brother *Parke*, I will add a very few words. In the first place, I entirely concur with my Brother *Wilde*, that this ought, in all fairness and candour, to be taken as a direction given by the Judge at the trial, that is, ought to be taken as a direction so far as relates to the private charity. When the short-hand writer's notes are looked at, and coupled with what my Brother *Parke* states, I cannot, on the other hand, doubt that the observation about the sermon ought *not* to be taken as a direction. Although at one time he stated that it stood in the same category, yet he corrected himself afterwards; and it is plain to me, that my Brother *Byles* acted on this distinction. Therefore the question only is, whether my Brother *Parke* was right in telling the jury that this private charity, that is, the charity in question,—I will not beg the question by calling it *private*,—was not a matter which entitled the defendant to assert the privilege given with respect to comments upon public acts. Let us see how the law is on that subject. My Brother *Wilde* argued the case as if, in deciding against him, we were to be supposed to lay down some rule, that the policy of having charities in a parish that excluded dissenters was not the legitimate subject of comment, and that the press were to be restrained if they did make such comment, and that private individuals might be proceeded against by action, or perhaps criminally, if they indulged in such comments; and I should have entirely gone with him, if the law were at all as his argument would seem to imply that it was. I concur with him to the full extent, that a man's conduct, as the clergyman of a parish, in respect to the expediency of so limiting private charities, is the fairest possible subject of observation; and if a man, having made the strongest observations upon the impolicy of such a matter, then added to it, "Mr. Gathercole sanctioned such a charity," he has a right to do that; and if Mr. Gathercole brought his action against him, he

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would plead that it was true. Then let us see how the case stands with respect to matters which are called "of a public nature." In every action of libel, as in an indictment for libel, the act done is alleged to have been done maliciously; and in the case of a libel against an individual, it is conclusive that it was done maliciously, unless some justification is put upon the record; but in the case of comments upon the public acts of public servants, (and there are other cases to which the same observation would apply), you may at the trial, although you plead nothing but not guilty, shew that what you have done is a justifiable act, by shewing what amounts only, in substance, to this:—it is not done maliciously. Just in the same way I may shew, if I have written of such and such a person, "he is a drunken fellow, and not very honest," that this may be perfectly justifiable as a privileged communication, in answer to a question put to me—"would you advise me to take that man as my servant?" I am perfectly justified in giving that answer, and I need do nothing more, and could do nothing more, I believe, in such a case, than plead not guilty. If I make reasonable comments upon the conduct of public men in the discharge of their public duties, whether they be generals, or ministers, or judges, or possibly advocates, (and I should certainly think also, on the same principle, clergymen), I am justified in doing it; and therefore I confess I wish to take this opportunity of saying, that, as at present advised, I should not have gone the length with my learned Brother *Parke*, in saying that comments on sermons would not come within the category of public acts. I should probably have thought they would do so, but I give no opinion about it, because it does not seem to me that that question arises. The question here is, is it or is it not a matter which you can excuse under the general issue, that you have made comments upon the acts of a clergyman in the mode of his administering charity, which comments would, *ex concessis*, have been libellous if these be not public

acts. Now it seems to me preposterous to say, that the act of a clergyman, in sanctioning some individuals in his parish, in giving relief to some, and excluding a large class of others who are not to partake of it, can be considered in the light of a public act. The act does not become a public act, because half a dozen or a dozen join in it; it is essentially private; they may manage it as they please. As was thrown out in the course of the argument, you might as well say it was a public act, if you sanction a charity for foreigners in distress. I do not see where the line is to be drawn. It is no part of a clergyman's public functions to preside at a clothing charity: it is something which, although he is a clergyman, and therefore, in a sense, filling a public character, he does merely as one individual there present; and therefore I think that this does not come within the category of public acts, and consequently that the direction was perfectly right. I may add, that there is really no pretence for saying that any one of the observations made in this libel could possibly have been treated as *fair* observations on that particular act; at the same time, I do not proceed on that ground,—that would be a very unsafe ground to proceed upon, if the direction had been wrong in point of law. If I had been of opinion that this was a public act, I think my Brother *Wilde* would have been entitled to the rule. I think it was clearly not a public act, whatever might have been the case of the sermons, if the question had arisen, in which I, as at present advised, should have concurred with my Brother *Wilde*; but in regard to this, I think it was a mere private administration of a charity; and although I may have one opinion, and anybody else may have another, as to the policy of excluding dissenters, and in such a case it may have been wiser to have made no such distinction, yet that does not make it a matter of a different genus from what it would have been, if it had been a charity to give to any person whatever in the parish that was in distress. I think, therefore, the rule ought not to be granted.

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PARKE, B.—In explaining to the Court the course I pursued with regard to the admission of evidence, and the reasons that governed me in admitting it, I have already said as much as I think it is necessary to say on that part of the case. I wish to add a word or two with respect to the more important question, whether or not I was right in informing the jury in this case, that there was no justifiable cause or excuse for the publication of a libel upon the plaintiff, in the circumstance of the then existing regulations which he, as a clergyman of the parish, had originated or sanctioned for the purpose of administering charity to the poor. Upon the trial, I, somewhat more at length than is usual with me, explained to the jury what the nature of a libel was: I told them the definition of a libel was, that which is written or printed, and published, calculated to injure the character of another, by bringing him into ridicule, hatred, or contempt; and I said every publication of that description, published without justifiable cause or excuse, was the subject of an action. With respect to the truth, that must be pleaded. Then I left to the jury the question of libel, intimating my opinion pretty strongly that the matter of this paper was libellous, and on that there could not be a question. Then I expressed an opinion that there was no occasion for the publication which could render it excusable; and the question really is, whether there was any occasion which would justify the remarks that had been made, or any remarks upon the conduct of the plaintiff; because, if the statements contained in this paper are *true*, then the rule is that the defendant must plead the truth of them; but nevertheless, if the plaintiff has given lawful occasion by his conduct for the remarks, that is evidence under the general issue. I was of opinion that, although a magistrate, or a minister, gives occasion for remarks by his public conduct, in exercising the functions of a magistrate or a minister, which concern the public; and although an individual who gives to the public any literary

work, does the same thing, that, with respect to a clergyman, he gives no such occasion by instituting or carrying into effect any arrangements for a private charity. I thought also, that the clergyman, by preaching a sermon to his own congregation, did not thereby put it on the same footing as a printed and published sermon; but from the first I never gave any decided opinion on that question. If any expression of an unqualified opinion escaped my lips in the course of the interlocutory observations that I made, with the view of shortening my Brother *Byles's* speech, I certainly corrected it; and his impression must have been, that on that part of the case I had given no decided opinion. When I summed up, I said the same thing. I had a strong opinion that the mere circumstance of preaching sermons did not make them public property, and did not invite observation on them from the press in general, in the same way that a publication of a literary work does: and with all respect to my Brother *Relfe*, I must own I still am of the same opinion, viz., that the preaching a sermon in the ordinary mode of a clergyman's duty, in the parish church, does not make it public property, and invite observation upon it, so as to allow the excuse, under the general issue, of any remarks that a person chooses to publish upon that sermon. With regard to the other point, I certainly never felt any doubt, and feel no doubt now, that because a clergyman chooses to institute or to recommend a subscription among the parishioners for a charity of any kind, and makes regulations for that purpose, by so doing he does not put those regulations in the same position as a literary work, and make them public property, and so give occasion to anybody to make criticisms on his conduct in that respect. I am clearly of opinion that he does not, and consequently, if the publication was libellous on the plaintiff, as to which there is not the least doubt, there certainly was no defence under the general issue.

Rule refused.

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HUGHES v. BUCKLAND and Others.

The defendants, servants of P., apprehended the plaintiff while fishing in the night-time near the mouth of the river Ogwen, in Carnarvonshire, in which river P. had a several fishery. In an action of trespass for this arrest, the defendants gave much evidence to shew that P.'s fishery included the place where the plaintiff was apprehended.

The jury, however, defined the limits of the fishery so as to exclude that place by a few yards; but they also found that P. and the defendants reasonably believed that it included that place:—*Held*, that the defendants were entitled to the protection of the stat. 7 & 8 Geo. 4, c. 29, ss. 35 and 63.

**TRESPASS**, for assaulting the plaintiff, and imprisoning him, and forcing him to go in custody along a certain public way, &c., and taking from him a certain net, &c. Plea, not guilty, by statute.

At the trial, before *Parke*, B., at the last Summer Assizes for Anglesey, it appeared that the action was brought against the defendants, who were gamekeepers of Colonel Pennant, of Penrhyn Castle, in the county of Carnarvon, for taking him into custody, and taking from him a net, with which he was fishing in the night-time, on the Lavan sands, in the Menai Straits, near the mouth of the river Ogwen. The defendants justified as the servants of Colonel Pennant, under the stat. 7 & 8 Geo. 4, c. 29, ss. 35 & 63 (*a*), on the ground that the plaintiff was illegally fish-

Sect. 34 enacts, "That if any person shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water which shall be private property, or in which there shall be any private right of fishery, every such offender, on conviction before a justice, shall forfeit a sum not exceeding 5*l.*, besides the value of the fish taken."

Sect. 35. "If any person shall at any time be found fishing against the provisions of this act, it shall be lawful for *the owner of the ground, water, or fishery where* such offender shall be found, his

servants, or any person authorised by him, to demand from such offender any rods, lines, hooks, nets, &c., which shall then be in his possession; and in case such offender shall not immediately deliver up the same, to seize and take the same from him, for the use of such owner."

Sect. 63. "Any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this act, (except only the offence of angling in the day-time,) may be immediately apprehended without a warrant,

ing within the limits of a several fishery, of which Colonel Pennant was the owner. The defendants advanced a great mass of documentary and oral evidence to prove the ownership of the fishery; on the part of the plaintiff, it was admitted that it existed in the river Ogwen; but it was denied that it extended into the Menai Straits. The defendants' counsel further contended, that even if the place in question were without the actual limits of the fishery, yet, as Colonel Pennant no doubt believed, and had reasonable grounds, upon the evidence given in this cause, for believing that it was within them, the defendants were entitled to a verdict, on the ground that, the trespass being an act done in pursuance of the stat. 7 & 8 Geo. 4, c. 29, the venue ought, according to the 75th section of that act, to have been laid, and the cause tried, in the county of Carnarvon, where the fact was committed, and the defendants ought to have had notice of action. The learned Judge left it to the jury to say, first, whether Colonel Pennant was the owner of a private fishery in the place at which the plaintiff was fishing when he was taken into custody; secondly, if not, whether Colonel Pennant reasonably and bonâ fide believed that he was the owner of a private fishery in that place; and thirdly, whether the defendants reasonably and bonâ fide believed that he was such owner. The jury, after considerable deliberation, drew a line upon a plan which had been handed

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by any peace-officer, or by *the owner of the property on or with respect to which the offence shall be committed*, or by his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace," &c.

Sect. 75. "For the protection of *persons acting in the execution of this act*, be it enacted, that all actions and prosecutions to be commenced *against any person*

*for anything done in pursuance of this act*, shall be laid and tried in the county where the fact was committed; and shall be commenced within six calendar months after the fact committed, and not otherwise, and notice of writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action," &c.

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up to them, extending from the mouth of the river Ogwen into the Menai Straits, and stated that they found that that line, which excluded by a few yards the spot where the plaintiff was fishing, was the boundary of Colonel Pennant's fishery in the straits; but they found also, that both Colonel Pennant and the defendants bonâ fide and reasonably believed that the fishery extended over that spot. The learned Judge was of opinion that the defendants, under these circumstances, were entitled to the protection of the act of Parliament, and directed a verdict for the defendants, giving the plaintiff leave to move to enter a verdict for him, with £5 damages.

In last Michaelmas Term, *Jervis* obtained a rule nisi accordingly, contending that the statute protected only persons who were *in fact* the owners of a fishery in the place where the offender was found, and their servants and persons authorised by them. Against this rule

*W. Yardley* (with whom were the *Solicitor-General* and *Townsend*) now shewed cause.—The defendants were entitled to the protection of the act, as being “persons acting in the execution of the act,” within the meaning of the 75th section, it being found by the jury that they reasonably and bonâ fide believed that Colonel Pennant was the owner of a private fishery in the place where the plaintiff was apprehended; and it is not necessary, for this purpose, that it should have been shewn that he was in fact the owner of a fishery in that place. The jury found him to be the owner of a fishery, the limits of which were within a very short distance of the spot in question; and the evidence given of his title shewed that he had ample grounds for believing that it extended much further. The 35th section of this act of Parliament authorises “the owner of the ground, water, or fishery, where such offender shall be so found,” that is, “shall be found fishing against the pro-

visions of this act," "his servants, or any person authorised by him," to demand from such offender any rods, lines, hooks, nets, &c., which shall then be in his possession; and if he do not deliver them up, to seize and take them from him for the use of such owner. Sect. 63 enacts, that any person found committing any offence punishable under the act, except angling in the day-time, may be apprehended without warrant "by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or any person authorised by him," &c. Then the 75th section, "for the protection of *persons acting in the execution of this act*," directs that all actions and prosecutions to be commenced "against *any person*, for anything done in pursuance of this act," shall be laid and tried in the county where the fact was committed, and that a month's notice of action shall be given. Now all the authorities shew, that, in the construction of enactments of this nature, the protection extends to all persons who bonâ fide and reasonably believe that they are acting in conformity with the act of Parliament, because otherwise they would be nugatory altogether, as persons who strictly comply with the act of Parliament have a complete justification under the powers given by it, and need no such protection. The analogous cases which have been decided on the stat. 24 Geo. 2, c. 44, relating to justices of the peace, are strongly in point for the defendants. Thus, in *Bird v. Gunston* (a), a magistrate was held entitled to notice of action for an act done by him when acting as a magistrate, although what he did was not strictly within the scope of his office. In *Prestidge v. Woodman* (b), a magistrate who acted *out of his jurisdiction* was held to be, nevertheless, entitled to notice of action. That case bears a strong analogy to the present. So also, where *one* magistrate acted alone, in a case where the jurisdiction was required by law to be exercised by *two*: *Weller v.*

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(a) 4 Dougl. 275; 2 Chit. R. 459.

(b) 1 B. & Cr. 12.



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*Toke (a)*. Again, in *Daniel v. Wilson (b)*, an *exciseman* was held to be entitled to notice of action under the stat. 23 Geo. 3, c. 70, s. 30, in an action of assault against him by a person whom he assaulted, wrongly supposing him to be a smuggler. In *Cook v. Leonard (c)*, the general principle was laid down by the Court, that notice of action is necessary, under such a provision as this, in all cases where the defendant had reasonable ground for supposing that the act done by him was in execution or under the authority of the act of Parliament. *Hopkins v. Crowe (d)* was cited for the plaintiff at the trial, but that case is quite distinguishable. There the arrest was made under the Cruelty to Animals Act, 5 & 6 Will. 4, c. 59, which authorises the owner of the animal illtreated to give the offender in charge to a constable; but the charge was made, not by the owner of the animal, but by his son, who could not possibly have entertained a reasonable belief that he was the owner. Here the act of Parliament was designed for the protection of those who have acted illegally, but *bonâ fide*; and it is a case in which there was undoubtedly the least possible illegality. He was then stopped by the Court, who called upon

*Jervis and Welsby*, in support of the rule.—The real principle applicable to this case, and with which all the authorities are consistent, is, that where protection is given to persons for acts done by them in pursuance of an act of Parliament, the party must, in order to have the benefit of that protection, shew that he *fills the character* mentioned in the act. Whether the parties claim protection as magistrates, constables, revenue officers, or commissioners, they must actually fill those characters, in order to be entitled to the immunity; and it is not sufficient that they *bonâ fide believe themselves to fill those characters*. Thus, in

(a) 9 East, 364.

(b) 5 T. R. 1.

(c) 6 B. & C. 351.

(d) 4 Ad. & E. 774.

*Bird v. Gunston*, *Weller v. Toke*, *Prestidge v. Woodman*, and *Wedge v. Berkeley* (*a*), the defendants were actually magistrates, although, acting in that capacity, they had acted erroneously or illegally. In *Greenway v. Hurd* (*b*), and *Daniel v. Wilson*, the defendants were actually excise-officers; in *Ballinger v. Ferris* (*c*), and *Cook v. Leonard*, they actually filled the office of constable. In all the other cases, as *Butler v. Ford* (*d*), *Norris v. Smith* (*e*), *Cann v. Clipperton* (*f*), *Jones v. Gooday* (*g*), the parties filled the office, and answered the description mentioned in the protecting clause. So, in *Beechey v. Sides* (*h*), which was a case that arose on the same statute as the present, the defendant, being in fact the owner of the premises trespassed on, was a party entitled to apprehend the plaintiff, and therefore was held to be within the 75th section. On the other hand, where a party had acted as a justice, without being actually such, he was held not to be entitled to notice under the 24 Geo. 2, c. 44, although he had acted bonâ fide under a supposed authority given by the charter of the borough: *Jones v. Williams* (*i*). So, in *Bush v. Green* (*k*), a gamekeeper who had not actually renewed his deputation since the stat. 1 & 2 Will. 4, c. 32, was held not to be entitled to notice of action under the 47th section of that act, the words of which are quite as large as in the present case, the protection being given to "all persons acting in the execution of the act." That case was confirmed in *Lidster v. Borrow* (*l*). In *Hopkins v. Crowe*, again, the defendant, not filling the character of actual owner of the animal ill-treated, was held therefore not to be entitled to notice. [*Parke, B.*—The defendant there could not reasonably have

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(*a*) 6 Ad. & E. 663.

(*b*) 4 T. R. 553.

(*c*) 1 M. & W. 628.

(*d*) 1 C. & M. 662.

(*e*) 10 Ad. & E. 188.

(*f*) Id. 582.

(*g*) 9 M. & W. 736.

(*h*) 9 B. & C. 806.

(*i*) 3 B. & C. 762.

(*k*) 4 Bing. N. C. 41.

(*l*) 9 Ad. & E. 654; 1 P. & D. 447.

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believed himself to be the owner.] The decision did not proceed upon that ground, but upon the ground that the protecting clause of the act extended only to an officer, or to the owner of an animal ill-treated, acting upon view or information. *Patteson*, J., says, “The defendant was neither officer nor owner. It is said that he was, nevertheless, entitled to the protection of notice, because he acted *bonâ fide*. But to what extent would such a rule go? For example, by a late act as to game, [1 & 2 Will. 4, c. 32, ss. 31, 47,] persons trespassing on lands may, in certain cases, be arrested by the occupier of the land or his servant, or other persons having certain authorities; and in actions for anything done in pursuance of that act, notice of action is required, and other restrictions are imposed. According to the argument used to-day, a person, *not being the owner or occupier of the lands*, nor otherwise authorised, but thinking himself entitled to act, might arrest a trespasser, and, if sued, insist upon the protections of the statute.” His lordship then refers to the case of *Pratt v. Hillman* (a), which had been cited in the argument, and observes that there “the defendant *was the party described by* sect. 42 of the Building Act, 14 Geo. 3, c. 78, and having the right to proceed under that clause, though he had taken a wrong step; he was *consequently* entitled to notice, under section 100 of the same act.” It has been said, that if this construction of the statute be adopted, the protecting clause will be rendered nugatory; but that is not so, because there are many ways in which the party described in the statute may commit an excess of authority, as by taking away the offender’s nets, &c., without previous demand; or by imprisoning him for an unreasonable time without taking him before a magistrate; or by apprehending him when angling in the day time. The words “any person,” in the 75th section, ought therefore to be read in connexion with

(a) 4 B. & C. 269.

the words in sects. 35 and 63, descriptive of the persons who have a right to arrest, &c., under the statute, and to be limited to the persons so authorised.

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POLLOCK, C. B.—I think this rule ought to be discharged. It is unnecessary for me to advert to all the cases, a long list of which has been brought before us in the course of the argument. We ought, if we can, to ascertain the meaning of the act of Parliament, and give it such a construction as shall make it consistent with good sense and justice. The object of the clause in question was to give protection to all parties who honestly pursued the statute. Now every act consists of *time*, *place*, and *circumstance*. With regard to *circumstance*, it is admitted, that if one magistrate acts where two are required, or imposes twelve months' imprisonment where he ought only to impose six, he is protected, if he has a general jurisdiction over the subject-matter, or has reason to think he has. With respect to *time*, the case of *Cann v. Clipperton* shews that a party may be protected although he arrests another after the time when the statute authorises the arrest. *Place* is another ingredient; and I am unable to distinguish the present case from that of a magistrate, who is protected although he act out of his jurisdiction. A party is protected if he acts bonâ fide, and in the reasonable belief that he is pursuing the act of Parliament. One who acts in perfect execution of the act of Parliament has no need to tender amends, and does not stand in need of any protection. The protection is required by him who acts illegally, but under the belief that he is right. I should have drawn the same conclusion, if the 75th section had repeated the terms of the 63rd section. I should then have construed it to mean, that the owner of the right of fishery had a right to apprehend trespassers; and if a person did wrong, either as to time, place, or circumstance, whilst reasonably and bonâ fide *believing himself* to be the owner, and therefore acting in pursuance of the act, he was

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to have the protection of notice of action and of venue. Here the owner reasonably and bonâ fide believed himself to be entitled to seize the plaintiff, and to take from him his net; and I can see no difference in this respect between seizing a man's net or rod under the act of Parliament, without a demand, in which case the party seizing would, if he acted bonâ fide, clearly be entitled to protection, or seizing it beyond the limits of his domain. If we look at the spirit of the act, we shall find it to be a matter of indifference whether the error is committed in respect to time, place, or circumstance. If a party does an act, reasonably and bonâ fide believing it to be in pursuance of the act of Parliament, it is sufficient if he fills the character in one respect. Here the defendants' master was owner of a neighbouring fishery, and the net was seized because the defendants believed him to be the owner of a fishery where the plaintiff was fishing. We need not say how far from the limits of his own land a party would be justified in seizing the nets of another. Here the jury have found that the defendants bonâ fide believed that Colonel Pennant had a private right of fishery in the place where the plaintiff was fishing. It is enough that we confine our opinion to the case before the court.

ROLFE, B.—I am of the same opinion. The facts of the case are very short. Colonel Pennant is the owner of a fishery in the Menai Straits; and the 35th section of this act of Parliament authorises the owner of a fishery, or his servants, to seize the rods and nets of parties who illegally fish within it. His servants found a man fishing in what they supposed to be their master's fishery, and they thereupon seized his net. In the ordinary case, an action might be brought against them without notice; but the 75th section of this act requires that notice shall be given, and that the venue shall be laid in the county where the cause of action arose. I must own that in the course of the argument I have

changed my opinion on this subject. At first, I thought the defendants entitled to the protection of the act, as the servants of the owner of a neighbouring fishery, they bonâ fide believing the plaintiff to be within the limits of that fishery. The 75th section gives protection to *all persons* for anything they do in pursuance of the act of Parliament. The words are quite general, and would seem to protect every one for what he bonâ fide believes he does in pursuance of the act of Parliament. These words, however, "any person," would appear to require some qualification. They are, therefore, to be confined to parties who are supposed to know the law; and therefore, where a party bonâ fide and *reasonably* believes himself to be the owner—that is the qualifying circumstance—the party is then fully protected, and the whole difficulty is removed. This was all that was really meant by *Patteson, J.*, in the case of *Hopkins v. Crowe*. The question here is, did the parties, knowing the law, reasonably believe that the facts brought them within it? It is clear they did; and that circumstance distinguishes the case of *Bush v. Green* from the present; because there the defendant could not reasonably have considered himself a gamekeeper. All who bonâ fide and reasonably think they fill the character mentioned in the several statutes, and act in pursuance of them, are protected.

PARKE, B.—I retain the opinion I formed in this case at the trial. The question arises upon the 75th section of this act of Parliament, which must be construed, like all other acts, according to its grammatical sense, avoiding any construction which would lead to absurdity, and looking at the modifications that the decisions have introduced. The act is general in its terms, and gives protection to all persons for all acts done in pursuance of it. Those words do not mean acts done in *strict* pursuance of the act, because, in such a case, a party would be acting legally, and therefore would not require protection. The words, therefore, must

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be qualified by the decisions; and then the meaning will be, that a party, to be entitled to protection, must bonâ fide and reasonably believe himself to be authorised by the act. In the present case, the defendants, in order to be protected, must have bonâ fide and reasonably believed Col. Pennant to be the owner of the place where the plaintiff was fishing, and that the trespass was committed within the limits of his property. The jury have found the bona fides, and the reasonable belief of the defendants that the trespass was committed within the limits of the property of their master. At the trial, I reserved the point out of deference to the opinion of my Brother *Patteson*, as expressed in *Hopkins v. Crowe*, and not from any doubt that I entertained upon the subject. The authorities may be divided into two classes. In the first class is to be placed the case of justices, who are entitled to certain privileges by the 24 Geo. 2, c. 44, and there are other acts applying to constables; and there, in order to obtain the benefit of the act, the parties must be *actually* justices or constables. So, where certain powers are given by local acts to *trustees*, the bona fides is immaterial, although, by a late decision of the Court of Queen's Bench (*a*), it is sufficient if they are trustees de facto. That disposes of all the cases except *Hopkins v. Crowe*. My Brother *Patteson* is correct in his observation in that case, that the defendant was not entitled to protection; and the reason was, that he could not have supposed that he was the owner of the horse that had been ill-treated. There is nothing in the cases to require a different construction from that which we have given in the present case. The statute extends protection to all who bonâ fide and reasonably believe that they fill the character, and are authorised to act; and the defendants are in that predicament.

Rule discharged.

(*a*) *Harrison v. Varty*, Trin. T., 1845; not yet reported.

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HUGGINS v. WAYDEY and Another.

May 2.

**TRESPASS** for breaking and entering a close of the plaintiff, and cutting down his trees growing therein. Plea, Not guilty, by statute. At the trial, before *Coltman, J.*, at the last assizes at Northampton, the defendants justified their entry on the close, and the cutting down of a tree therein, as surveyors of the highways, under the stat. 5 & 6 Will. 4, c. 50, s. 64, on the ground that the tree overhung the highway, so as to be a nuisance to it. It appeared, that, on the 22nd of April, 1845, the inhabitants of the parish had met in vestry, and appointed the plaintiff and the defendant Waydey surveyors of the highways for the ensuing year. On the 30th of April they met again, and annulled the appointment of the plaintiff, and appointed the defendant Field surveyor in conjunction with Waydey. The two defendants shortly afterwards committed the trespass in question, which was the first act done by them under colour of their office. No notice of this action had been given to the defendants; and it was objected on their behalf, at the trial, that they were entitled on this ground to a verdict, under the 109th section of the above statute (*a*). The learned Judge was of that opinion, and accordingly directed a verdict for the defendants. On a former day in this term (April 17),

The defendant, having been appointed a surveyor of the highways by the inhabitants in vestry, but informally, cut down, in the supposed exercise of his duty as surveyor, a tree which was overhanging the highway so as to be a nuisance to it:—*Held*, that he was entitled to the protection of the stat. 5 & 6 Will. 4, c. 50, s. 109.

*Humfrey* moved for a new trial, on the ground of misdirection, contending, that, as the defendants were not duly appointed surveyors, they were not entitled to the protec-

(*a*) Which enacts, "That no action or suit shall be commenced against *any person* for any thing done *in pursuance of* or under the authority of this act, until

twenty-one days' notice has been given thereof in writing to the justice, surveyor, or other person against whom such action is intended to be brought," &c. &c.



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accept, take, or receive of or from him the plaintiff, the residue of the said soda ash, or any part thereof, or pay him for the same in manner aforesaid, or otherwise, but on the contrary thereof, have hitherto wholly neglected and refused so to do: whereby, &c. There were also counts for goods sold and delivered, and on an account stated. Plea (amongst others), nonassumpsit, and issue thereon.

At the trial, before *Cresswell*, J., at the Liverpool Summer Assizes, 1846, it appeared that the action was brought to recover the balance due upon the sale by the plaintiff to the defendants of a quantity of soda ash, according to the following bought note:—

“17, Exchange Buildings, Liverpool, 7th March, 1844.  
 “Messrs. Grote, Tomkins, & Co.

“I have this day bought for you the following goods *from*  
*J. & T. Johnson*:—

“Fifty tons soda ash, 48 and 50 per cent., Huson’s test, in tierces, free on board, at  $2\frac{3}{4}d.$  per degree.

“To be delivered in all May. Customary allowances. Payment, cash in fourteen days from delivery, less  $2d.$  off.

“J. H. RAYNER.”

It appeared in evidence, that the plaintiff, although on the face of this note he appeared to contract as the agent of Messrs. J. & T. Johnson, was himself the owner of the goods, and the real principal in the transaction. Thirteen tons out of the fifty were delivered to the defendants early in May, and accepted by them; and there was strong evidence to shew that at that time the fact of the plaintiff being the real principal in the sale was disclosed to, and fully known by, the defendants. The invoice sent with these thirteen tons was made out in the name of the plaintiff. The defendants refused acceptance of the rest of the goods. The learned judge, in summing up, told the jury, that if they were satisfied from the evidence that the defendants had received the first portion of the goods with full knowledge of the fact

that the plaintiff was the real seller, and that all parties then treated the contract as one made with the plaintiff as the principal in the transaction, he was entitled (subject to other questions which arose in the cause) to recover in this action. The jury found a verdict for the plaintiff for the amount claimed.

In last Michaelmas Term, *Baines* obtained a rule nisi for a new trial, on the ground of misdirection. In Hilary Term (Jan. 29),

*Watson* and *J. Henderson* shewed cause.—The simple question is, whether there was in this case any evidence of a contract with the plaintiff. If the plaintiff was really interested in the goods, and not the mere agent of Messrs. Johnson, he is entitled to use that contract, and to describe it as a contract with himself. The real principal may intervene at any time; and, on the other hand, the agent may come and say that he is in truth the principal. In *Atkins v. Amber* (a), *Eyre*, C. J., ruled, that a broker, who had advanced money on goods, might declare on a special contract respecting the sale in his own name, and that it was not a variance, although the sale-note mentioned the name of the principal. So, an auctioneer may sue a purchaser at the auction for goods sold and delivered, even though the sale was at the house of the owner of the goods, and they were known to be his property: *Williams v. Millington* (b). [*Pollock*, C. B.—No doubt; but that is the case of an *avowed* agent.] Then that case concludes the present, because, if interested, the agent certainly may sue. Applying the principle of the case to this, if an agent, who has no interest save that of his commission, might come in and sue as principal, à fortiori, an agent who has a real interest in the subject-matter of the contract may. *Bickerton v. Burrell* (c) will be relied upon on the other side. There it was held that a plaintiff, who had made a contract as agent for a third person, could

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(a) 2 Esp. 493.      (b) 1 H. Bl. 81.      (c) 5 M. & Sel. 383.

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not sue as principal, without giving notice to the defendant, before action brought, that he was the party really interested. But, first, that was the case of money had and received, which is different from an action on a special contract; secondly, there was, upon the evidence in this case, full notice to the defendants of the plaintiff's real interest in the goods. Further, there was evidence of an original contract immediately between the plaintiff and the defendants. The defendants paid the plaintiff a part of the price, and accepted part of the goods, on the footing of the contract being with him.

*Baines and Crompton*, in support of the rule.—The written contract proved in this case *excludes* the presumption of a contract with the plaintiff; it describes him as the agent of others; its terms are inconsistent with the notion of any responsibility on his part. [*Pollock*, C. B.—The contract does not clearly do so; but supposing that it did?] Then the plaintiff could not recover: he is estopped by his own language and conduct from denying that there was no other contract; and moreover, there is no ground for saying that there was any other contract; the plaintiff has acted solely on the written contract, and has always represented Johnson as being the real principal. There is nothing in the invoice inconsistent with that. It shews that he debited the defendants with the amount, but then it is sent in by him as broker. Besides, all that amount has been paid. [*Pollock*, C. B.—Supposing the original contract was with Johnson, could not and may not Rayner have been substituted by subsequent agreement? or, suppose Johnson to be a non-existing person, can no one sue?] The question is, whether there is proof of a contract in terms, as stated in the declaration, to accept the thirty-seven remaining casks from the plaintiff. [*Pollock*, C. B.—The only question is, whether there is any evidence of a contract for the substitution of the plaintiff for Johnson.] There was no evidence that the plaintiff was ever substituted, or *bound* to deliver the thirty-seven casks.

[*Alderson, B.*—Is Rayner precluded from shewing himself the principal in the original contract?] He has avowed himself the agent,—has assigned that character to himself; and he cannot afterwards say that he is not agent. You cannot vary the written contract by parol; the consideration would be different. The question really comes to this, whether you can by parol substitute one person for another named in writing, which, except in cases of principal and agent, cannot be done: you have no right to introduce a new party. The true question is, whether evidence can be given to shew that the contract, though made in the name of Johnson, was in fact made by Rayner. If so, you make a new contract, which does not meet the declaration; it is different as respects time and consideration. Suppose the case of a contract with a builder of great repute; could another come in and say he was the principal? Here the defendants considered they were buying from Johnson, and they find that the broker, whom they trusted to get the goods at as low a rate as possible, is the person who has sold to them for himself. *Bickerton v. Burrell* is an express authority for the defendants. There Lord *Ellenborough* says, “Where a man assigns to himself the character of agent to another, whom he names, I am not aware that the law will permit him to shift his situation, and to declare himself the principal, and the other to be a mere creature of straw. That, I believe has never yet been attempted. . . . Has not the defendant, with whom the plaintiff dealt as agent, a right still to consider himself as such, notwithstanding he would now sue in the character of principal?” So where the same party sold goods by auction for A., under a *del credere* commission, and purchased them at the auction as the broker of B., (to whom A.’s name was not then declared, though it was shortly afterwards), and paid A. the price, it was held, in an action by the assignees of B. against the broker, to recover the balance due upon a resale of the goods made by him on account of B., that he was not entitled to set off the payment

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made by him to A.: *Morris v. Cleasby* (a). *Atkins v. Amber* does not apply: there the consideration was executed. In *Morris v. Cleasby*, Lord *Ellenborough* says (p. 575), "The principal must always be debtor, and that whether he is known in the first instance or not, except where the broker has by the form of the instrument made himself so liable." *Koster v. Eason* (b) is an authority to the same effect. Lord *Ellenborough* there (speaking of policies which had been effected by the defendants, who were brokers and insurance agents, for their principals, under a del credere commission), says, "Upon the other policies *Eason & Co.* could not sue in their own names; they can in no event, though they may have a lien upon the policies, or though they may pay their principals, bring any action but in the name of their principals. Swan [the underwriter] has not consented that they should, in any case, be entitled to stand as principals, or to be treated as the creditors, nor has he ever agreed that they should be considered as giving him credit at their own risk and on their own account." Upon the authority of these cases, this action cannot be maintained.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—In this case, which was heard before my Lord Chief Baron, my Brother *Rolfe*, and myself, the question was, whether the case had been properly left by my Brother *Cresswell* to the jury. The facts were these: The plaintiff had made a contract in writing, by which he appeared to be the agent for another party, who was named in the contract, and by which he sold to the defendants a quantity of soda-ash; and it was averred in the declaration, and proved at the trial, that although part of those goods had been delivered to the defendants, and accepted and paid for, yet that they had refused to receive and pay for the

(a) 4 M. & Sel. 566.

(b) 2 M. & Sel. 112.

residue. At the time when this contract was made, the plaintiff was himself the real principal in the transaction; and although the contract on the face of it appeared to have been made by him as agent for another party, there was evidence given at the trial, tending strongly to shew, that when the first parcel of the goods was delivered to and accepted by the defendants, the name of the plaintiff as the principal was then fully known to the defendants: and we think that it was then properly left to the jury to infer from the evidence, that the defendants, with the full knowledge of the facts, had received that portion of the goods, and that all parties then treated the contract as one made with the plaintiff as the principal in the transaction. The defendants' counsel, in the argument, contended against this view of the case, and cited the case of *Bickerton v. Burrell* as an authority that the plaintiff could not sue in such a case in his own name. That case is indeed in one respect stronger than the present, inasmuch as that was an action for money had and received, whereas this is a case of an executory contract. If, indeed, the contract had been wholly unperformed, and one which the plaintiff, by merely proving himself to be the real principal, was seeking to enforce, the question might admit of some doubt. In many such cases, such as, for instance, the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then shew himself to be the real principal, and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule. But the facts of this case raise a totally different question, as the jury must be taken to have found, under the learned Judge's direction, that this contract has been in part performed, and that part performance accepted by the defendants with full knowledge

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that the plaintiff was not the agent, but the real principal. If so, we think the plaintiff may, after that, very properly say that they cannot refuse to complete that contract, by receiving the remainder of the goods, and paying the stipulated price for them. And it may be observed that this case is really distinguishable from *Bickerton v. Burrell*, on the very ground on which that case was decided; for here, at all events, before action brought and trial had, the defendants knew that the plaintiff was the principal in the transaction. Perhaps it may be doubted whether that case was well decided on such a distinction, as it may fairly be argued that it would have been quite sufficient to prevent any possible inconvenience or injustice, and more in accordance with former authorities, if the Court had held that a party named as agent, under such circumstances as existed in that case, was entitled, on shewing himself to be the real principal, to maintain the action, the defendant being, however, allowed to make any defence to which he could shew himself to be entitled, either as against the plaintiff or as against the person named as principal by the plaintiff in the contract. It is not, however, necessary for us, in the present case, to question the authority of that decision.

For these reasons, we are of opinion that the case has been properly left to the jury; and we see no reason to be dissatisfied with their verdict. The rule, therefore, must be discharged.

Rule discharged.

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THORNETT v. HAINES.

April 28.

**ASSUMPSIT** for money had and received by the defendant to the use of the plaintiff, and on an account stated. Plea, non assumpsit.

At the trial, before *Pollock*, C. B., at the Middlesex Sittings after last Michaelmas Term, it appeared that this action was brought to recover back the sum of £315, which had been paid by the plaintiff to the defendant, an auctioneer, as a deposit upon the sale by auction to the plaintiff of certain leasehold premises, called the Bell Wine-Vaults, in Shoreditch. The plaintiff sought to avoid the contract, and recover back his deposit, on the ground that the sale was void by reason of the employment of a *puffer* to enhance the price. One of the conditions of the sale was, that the highest bidder should be the purchaser. The auctioneer, before the biddings commenced, stated that the premises were to be sold "without reserve." It appeared that a person of the name of Robinson attended the sale, and bid against and immediately before the plaintiff. A person named Fry, who had been referred to by Walker, the vendor, as the person to give information respecting the premises, and who had been similarly employed by Walker on former occasions, was also present at the sale, and was directing Robinson, by signs, when to bid and when to stop bidding. The plaintiff's counsel proposed to ask Robinson, who was called as a witness for the plaintiff, what had passed between him and Fry on the morning of the sale. This evidence was objected to on the part of the defendant, on the ground that Fry had not been shewn to be the agent of Walker in this matter. The Lord Chief Baron received the evidence, and the witness then stated, that, on the morning of the sale, Fry had directed him to attend and bid,

Where a sale by auction is advertised or stated by the auctioneer to be "without reserve," the employment by the vendor of a puffer to bid for him, without notice, renders the sale void, and entitles the purchaser to recover back his deposit from the auctioneer.



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judgment was mainly founded upon the ground that the defendant had refused to take an issue to try a disputed fact. But *Meadows v. Tanner* (a) is an authority to shew, that where property is put up for sale *without reserve*, the secret employment of a puffer on the part of the plaintiff, who actually bids, prevents the sale from being enforceable by a bill for a specific performance. In *Smith v. Clarke* (b), Sir *William Grant* decided in favour of the vendors, on the ground that they had not employed the bidder generally to enhance the price, but only to prevent a sale at an under value; and said, that, in a similar case to that of *Howard v. Castle*, he should come to a similar conclusion.

*Humfrey*, contra, contended, first, that there was no sufficient evidence of Fry being the agent of the vendor to bid or employ a bidder at the sale on his part, so as to render his statements and acts, and the acts of Robinson by his direction, evidence to affect the defendant: that Fry was only an agent for the purpose of shewing the premises and conducting the sale, but not to do any illegal or fraudulent act.

Secondly, assuming it to be proved that Robinson was employed to bid by the vendor, that does not entitle the plaintiff to avoid the sale. The rule at law and in equity, on this subject, must surely be the same: it is absurd that on one side of Westminster Hall a man may recover back his deposit-money, and on the other side may, in the same case, be compelled to perform his contract. The courts of equity have established it as a rule, that one person may be employed by the vendor as a bidder, in order to protect the property from going below its value, and the same rule ought reasonably to be established in the courts of law. Here there is nothing to shew that the property, in consequence of the biddings by Robinson, was sold above its value.

(a) 5 Madd. 34.

(b) 12 Ves. 477.

POLLOCK, C. B.—Upon the question, whether there was evidence to shew that Fry was the agent of Walker, the vendor, to bid at this sale, and whether the evidence which was objected to ought to have been admitted, the Court will take some time to consider. Assuming that there was sufficient evidence that Robinson was a puffer employed by Fry, as the agent of the vendor, I am of opinion that the plaintiff is entitled to recover in this action. The authorities cited by my Brother *Byles*, of *Howard v. Castle*, and *Wheeler v. Collier*, establish that, in the case of a sale without reserve, if a puffer be employed without notice of his being there to protect the interests of the seller, the sale is void. It is said that a different doctrine prevails in the courts of equity. I adopt the law as laid down by Lords *Mansfield*, *Kenyon*, and *Tenterden*. I think, however, that the decisions in the courts of law and equity may be reconciled. There is no distinction between a puffer bidding up to the buyer, or a bidding by him at a different stage of the sale; and if there were, it would not apply to this case, as here Robinson was a puffer, and bid immediately before the plaintiff. The only distinction between the cases in equity and law is this, that in the former there may be a *reserved* bidding without notice. But that does not apply to the present case, where the sale was distinctly stated and understood to be *without reserve*; and it matters not whether that announcement is made by the particulars of sale, or by the auctioneer by parol. The result is, that the plaintiff is entitled to recover his deposit, if he has satisfactorily made out that Robinson was in fact a puffer on behalf of the vendor.

PARKE, B.—If there is any proof of Fry being the vendor's agent to bid for him at the sale, then, as he bid himself, and employed another to bid also, there were two persons bidding, after a notification by the auctioneer of the sale being without reserve. The sale, therefore, is void on

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the ground of fraud, and the plaintiff is entitled to recover his deposit. As regards the present case, there is no difference in the law, as laid down in the courts of law and the courts of equity. Lords *Mansfield*, *Kenyon*, and *Tenterden*, have expressed their opinion, that, where the seller employs a party to protect the property which is to be sold to the highest bidder, although the Stamp Acts may authorise such a course, still the fact ought to be notified to the public. In equity, the employment by the vendor of one person to bid at a sale, in order to protect the property from being sold at an under value, is not fraud, although not notified, but in law it is otherwise. But all the cases, both at law and in equity, agree in this, that if more persons than one are employed to bid, that amounts to fraud, as only one is necessary to protect the property, and the employment of more can only be to enhance the price, and therefore renders the sale void. So also, if it be announced, either publicly or by the particulars of sale, that the sale is to be *without reserve*, all the cases in equity decide, that if a person is employed to bid, the sale is vitiated, inasmuch as the seller has in effect announced that he will not take that step. This was determined in the case before Sir *John Leach*, of *Meadows v. Tanner*; and the decision of Vice-Chancellor *Knight Bruce*, in the case of *Woodward v. Miller*, if it be examined, will be found to maintain the same doctrine—that if a sale be advertised generally, without any statement of its being without reserve, it is not fraud to employ a person to bid, but that the employment of such a person renders the sale void, if the sale is to take place without reserve. It is unnecessary, in the present case, to say whether a sale would be valid, if the vendor, without notice, employs a person to buy the property in. Here the sale was without reserve, and two persons were employed to puff. The sale, therefore, was invalid, and the plaintiff has a right to recover back his deposit.

PLATT, B.—Assuming that Robinson was authorised by Walker as a puffer, can the defendant retain the deposit? If we look at the contract, we cannot doubt that the deposit was obtained by fraud, as a puffer was employed to enhance the sale, in violation of the terms of the contract. Therefore, without going through the cases, it seems to me to be clear that the defendant, the auctioneer, cannot retain the deposit. Subject, therefore, to the question of fact, this rule must be discharged.

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On a subsequent day, the Court (*Parke, B.*, dissenting) expressed their opinion that there was sufficient evidence of Fry's being the agent of the vendor to bid, and the rule was thereupon discharged.

Rule discharged.

#### HAMMOND v. DAYSON.

April 29.

DEBT on a promissory note for £15, payable three month after date, with a count, in the sum of £30, on an account stated.

First plea, as to the first count, that just before the defendant made and delivered the said promissory note to the plaintiff, as in the said first count alleged, to wit, on &c., the plaintiff represented and stated to the defendant, that one James Davies had become and then was the landlord of

To a declaration containing two counts, the first on a promissory note for £15, the second in £30 on an account stated, the defendant pleaded to the first count a plea alleging special circumstances as to the mak-

ing of the note, which shewed that it was given without consideration, and upon a misrepresentation of facts; and he then pleaded, as to £15, parcel of the money and causes of action in the last count mentioned, that the making of the note in the first count mentioned was and is the said account stated in the last count mentioned, so far as the same relates to the said sum of £15, parcel &c., and that the several allegations and statements by the defendant made in his first plea were and are true, modo et formâ.

On special demurrer to the second plea, on the ground that, though it professed to answer only a part of the count on the account stated, it nevertheless presented an answer to the first count also:—*Held*, that the plea was good.

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the messuage and premises then occupied by the defendant, and entitled to the rent payable to the defendant in respect thereof; and that he the said plaintiff, as the agent of and for the said James Davies, was then authorised and entitled to demand and receive the said rent; and thereupon the defendant, confiding in the said representation and statements of the plaintiff, and believing the same to be true, did then, to wit, on &c., at the request of the plaintiff, make and deliver the said promissory note to the plaintiff, in manner and form as in the said first count mentioned, for and in respect of the said rent payable by the defendant in respect of the said messuage and premises, and for no other cause or consideration whatsoever; and further, that in truth and in fact the said James Davies never became nor was the landlord of the said messuage and premises occupied by the defendant as aforesaid, or of any part thereof, nor in any manner entitled to the rent payable by the defendant in respect thereof, or to any part of such rent; and that by means of the premises, the plaintiff deceived and defrauded the defendant, and thereby obtained from him the said promissory note in the manner aforesaid, and not otherwise; and further, that he never held, occupied, or enjoyed the said messuage and premises, or any part thereof, as tenant thereof to the said James Davies, or to the plaintiff, and that, save as aforesaid, there never was any value or consideration for the said note, or for payment by the defendant to the plaintiff of the amount or any part thereof.—  
Verification.

Second plea, as to the sum of £15, parcel of the money and causes of action in the last count mentioned, that the making of the said promissory note in the said first count of the declaration mentioned, was and is the said account stated in the last count mentioned, so far as the same relates to the sum of £15, parcel &c.; and further, that the several allegations and statements by him the said defendant made in and by his said first plea above pleaded, were and are true

in manner and form as in the said first plea alleged.—Verification.

Third plea, as to the sum of £15, other parcel and residue of the money and causes of action in the last count mentioned, *nunquam indebitatus*.

Special demurrer to the second plea, assigning for causes of demurrer, that the said plea, in the introductory part thereof, professing to answer only the sum of £15, parcel of the money and causes of action in the last count mentioned, nevertheless answers and presents a defence to the cause of action in the first count mentioned, as well as to the said sum of £15, parcel &c., in the said last count mentioned; that the plea answers in the body thereof more than it professes to answer in the introductory part thereof; that the mode of pleading adopted in that plea is not allowable, as tending to embarrass and perplex the plaintiff in his replication; that the allegation in the plea, that the making of the said promissory note was the said account stated, so far as relates to the said sum of £15, parcel &c., is unintelligible; that the mere making of the said promissory note cannot of itself be deemed an account stated; that the plea does not allege that the said account stated, so far as the same relates to the said sum of £15, was stated of and concerning no other money, matter, or thing than the said note or the money payable thereby.

Joinder in demurrer.

*Willes*, in support of the demurrer.—The second plea is bad in form. In the introductory part of it, it is confined to a part of the causes of action in the last count, yet it presents also a good defence to the first count. It is therefore informal, as being in truth an answer to more than it professes to answer. [*Parke*, B.—How is that an objection? The plea is an answer to a part of the account stated, as to which it is pleaded. What objection is it, that it also happens to disclose a good defence to a count in the declaration to which it is not pleaded?] This point was raised,

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but not decided, in *Burroughs v. Hodgson* (a). There can be no doubt that a plea which professes to answer the whole declaration, but is in truth an answer to a part only, is bad: 1 Saund. 28, n. (3). So it is, also, if it answer a count in the declaration to which it is not pleaded: *Grey v. Pindar* (b). That was an action of assumpsit on a promissory note payable by instalments, to which there was a plea of non accrevit infra sex annos, as to the said several causes of action except the last instalment. This plea was demurred to on the ground that the introductory part of it was inconsistent with its allegations, because it purported to be pleaded to part only of the causes of action, yet contained matter in bar of the whole; and the Court held it bad on that ground. [Parke, B.—There the introductory part of the plea was inconsistent with the body of it; that is not the case here. What can it signify, that the special circumstances which are alleged as an answer to the account stated also afford an answer to the other count?] In *Foot v. Baker* (c), which was an action of debt for 8*l.* 4*s.* money lent, and the same sum on an account stated, the defendant pleaded, that the said sum of 8*l.* 4*s.* in the first count mentioned was lent for the purpose of illegal gaming, and that the account in the last count mentioned was stated of and concerning the said sum of 8*l.* 4*s.* in the first count mentioned, and so lent as aforesaid. In a note of *Manning*, Serjt., to that case, it is said: “This plea appears to be bad for duplicity. As the plaintiff claims *two* sums of 8*l.* 4*s.*, the account stated must be understood, as alleged by the bill, to have been stated of sums *other* than that separately demanded in the first count, whether it be so expressed in the count or not. Thus the plea, besides the special answer, operates as a plea of *nunquam indebitatus* to the last count, or to an undivided moiety of both counts.” [Parke, B.—Here you have not objected

(a) 9 Ad. & E. 499 ; 1 P. & D. 328.

(c) 5 Man. & G. 335; 6 Scott, N. R., 301.

(b) 2 Bos. & P. 427.

to the form of pleading by reference to the first count.] In *Henry v. Earl* (a), where, in debt, a plea of payment was pleaded as to parcel of the debt only, without reference to the damages and costs, but in the conclusion stated, that the plaintiff accepted the sum paid in satisfaction of *all the causes of action in the declaration* mentioned which related to that sum, the Court seemed to think, that if the defect had been pointed out by the demurrer, the plea would have been bad on the ground of the latter allegation being larger than the introductory part.

Another objection to this plea is, that it is a violation of the rule against prolix pleading. The defendant ought to have pleaded to the whole declaration: *Mee v. Tomlinson* (b). [*Pollock*, C. B.—The plaintiff here puts forward his claim in two shapes, to each of which the defendant gives the same answer in separate pleas. Why should he not be at liberty to do so? *Parke*, B.—You charge the defendant with prolix pleading; may he not answer you by saying, you need not have had a count on an account stated?]

Again, the mode of pleading adopted here, by referring to the allegations in the first plea, tends to embarrass and perplex the plaintiff in his replication. He cannot take issue on the averment, that “the several allegations and statements by him the defendant made in and by his said first plea are true,” without putting in issue immaterial matter; and such being the allegation, he cannot *select* any particular fact alleged in the first plea, and traverse that fact only.

*Cole*, contra.—The principal objection taken to this plea has already received an answer from the Court. With respect to the last objection, it is difficult to see how the plaintiff can be embarrassed or perplexed by this mode of pleading; but, at all events, this objection is not sufficiently pointed out by the demurrer. It is only stated, that “the

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(a) 8 M. & W. 228.

(b) 4 Ad. & E. 262; 6 Nev. & M. 624.



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mode of pleading adopted in the said plea" is not allowable, as tending to embarrass and perplex the plaintiff in his replication; the objection is not pointed to that part of the plea which alleges that the several allegations and statements by him the defendant made in his said first plea are true; the "mode of pleading" complained of is merely that the plea answers in the body of it more than it professes to answer in the introductory part. [He was then stopped by the Court.]

POLLOCK, C. B.—I think the defendant is entitled to our judgment. A plea certainly ought not to refer to a former plea, so as to embarrass the plaintiff; but here it is not pointed out by the special demurrer how or in what manner the plaintiff is embarrassed thereby.

PARKE, B.—I think the objections taken in this case to the plea are not tenable. The first is, that it professes to be an answer only to the sum of £15, parcel of the money in the last count mentioned, yet it presents a defence to the causes of action in the first count, as well as to the £15, parcel of the money in the last count. I think it is quite a sufficient answer to that objection to say, that the plea is a good answer to the cause of action to which it is pleaded. Then the next objection is, that this mode of pleading is not allowable, as tending to embarrass or perplex the plaintiff in his replication. What the "mode of pleading" is which is referred to, we are left to guess; we cannot tell what the objection is. If it had been shewn in what manner the plaintiff was embarrassed by this mode of pleading, by reference to the first count, I should probably have thought the plea bad on that ground. Then it is said that the plea is unintelligible. Why, it merely amounts to this: that there was no account stated between the parties, except the giving of a promissory note for a certain amount, at three months' date, without consideration.

ROLFE, B., concurred.

PLATT, B.—The only question is, whether this plea is a good answer to that part of the last count to which it professes to be an answer. I do not see how the plaintiff can be embarrassed or perplexed by it. He is not confined to a traverse in the same general terms.

Judgment for the defendant.

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JAMES and Another v. CRANE and Another.

April 30.

THIS cause was referred, by order of Nisi Prius, to a barrister, who was to state a special case for the opinion of this Court. The parties were heard before the barrister in October 1845. On the 10th of January last the defendant died. On the 19th of February, the special case was delivered by the arbitrator to the parties.

Where, by order of Nisi Prius, a cause is referred to a barrister to state a special case, it is no ground for setting aside the case that it is stated after the death of one of the parties.

*Chilton* now moved for a rule, calling upon the plaintiff to shew cause why the special case should not be set aside, on the ground that it had been stated after the death of one of the parties. He cited "*Watson on Awards*," 2nd edit., p. 31, as an authority that the death of one of the parties to a submission to arbitration is a revocation of the authority of the arbitrator to make an award, and submitted that there was no valid distinction between that case and the present.

POLLOCK, C. B.—I think there is no ground for this application. Suppose this had been the case of a special verdict; the death of one of the parties before it was prepared and settled would have made no difference. As to the effect of the death of a party to a submission to arbitra-

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tion, the law is settled, and cannot now be altered: but a special case does not resemble an award. This is nothing more than the substitution of an arbitrator in the place of the judge, to settle the statement of the facts of the case.

PARKE, B.—I am of the same opinion. It must be presumed that the jury at the trial found the facts set forth in the special case. The arbitrator is a person appointed in the room of the judge to settle the case: if he had not been so substituted, the judge might undoubtedly have proceeded to settle the case after the death of the party. It is not a case in which the suit itself abates by the death. There is no ground, therefore, for this application.

ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

May 2.

LOWE v. STEELE.

A plea of payment into court, in an action of debt, must be pleaded to the *damages*, as well as to the *debt*; and the form of plea given by the rule of Trinity Term, 1 Vict., must be varied to meet the case.

DEBT for goods sold and delivered.—Plea (in the form given by the general rule of Trin. T., 1 Vict.), that the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of 13*l.* 5*s.* 9*d.*, ready to be paid to the plaintiff, and says that the defendant never was indebted to the plaintiff to a greater amount than the sum of 13*l.* 5*s.* 9*d.* in respect of the said causes of action in the declaration mentioned.—Verification, and prayer of judgment.

The plaintiff replied, accepting the money paid into court in discharge of the cause of action to which it was pleaded, and signed judgment for the residue.

In Easter Term, 1845, *Martin* obtained a rule calling

upon the plaintiff to shew cause why this judgment should not be set aside for irregularity; against which, in Trinity Term, 1845 (May 22),

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*Cowling* shewed cause.—This judgment was regular. The plea of payment into court admits the sum of 13*l*. 5*s*. 9*d*. to have been due in respect of the cause of action mentioned in the declaration, and is an answer to so much of the cause of action; but it affords no answer to the damages sustained by reason of the detention of the debt. The plaintiff might be entitled to recover interest, and could recover it only by way of damages. Inasmuch, therefore, as this part of the cause of action is left unanswered by the plea, the plaintiff was entitled to sign judgment. In 1 Saund. 28, n. (3), the rule is laid down, that “if a plea begin only as an answer to part, and is, in truth, but an answer to part, or though in law it is an answer to the whole, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by nil dicit; for if he demurs, or pleads over, the whole action is discontinued.” Here the plea does not purport to be pleaded to the whole cause of action, and the plaintiff could not new assign; and if he brought another action for the interest, the defendant might plead in bar the judgment in this action. *Hitchin v. Campbell* (a); *Lord Bagot v. Williams* (b). [*Pollock*, C. B.—How do you say the defendant ought to have pleaded?] He should have alleged that he never was indebted to the plaintiff, “nor has the plaintiff sustained damages,” to a greater amount than the sum paid into court; thus answering both the debt and the damages arising from its detention, like a plea of set-off. It may be said the plaintiff should have sued in assumpsit; but then, in the event of a judgment by default, he would have been subject to the inconvenience of a writ of inquiry. Before the New Rules,

(a) 2 W. Bla. 830.

(b) 3 B. & C. 235; 5 D. & R. 87.

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money paid into court in an action went in liquidation, pro tanto, of the debt and damages. And in *Kidd v. Walker* (a), where a defendant, being sued upon a security which bore interest, paid money into court sufficient to cover the principal, with interest down to the time of the commencement of the action, but not down to the time of the payment into court, it was held that the plaintiff might proceed in the action, and that the jury, on the trial, must give him damages for the interest accruing between the commencement of the action and the payment into court. In an action of debt, the plaintiff is entitled as matter of law to *some* damages, without which he would not have his costs under the Statute of Gloucester: *Blackmore v. Flemyng* (b). In *Henry v. Earl* (c), Lord Abinger, C. B., says: "No doubt costs form part of the damages resulting from the detention of the debt, and if there is no answer as to those costs, the plaintiff may sign judgment for so much. Though the damages in debt are in general considered as nominal only, yet the jury may give substantial damages if they think fit." Here, therefore, the plaintiff accepts and takes the money out of court in discharge of that claim only in respect of which it is paid into court, namely, the *debt*. [*Pollock*, C. B.—In *Bailey v. Sweeting* (d), a plea in the form you suggested just now was held bad, for not following the form given by the rule.] There the plea was bad, because it admitted some damages beyond the debt, and gave no answer as to such damages.

*Martin*, *contra*.—Whether the case be considered as at common law, or under the rule of court, this judgment was irregularly signed. The argument on the other side assumes that interest is recoverable as damages in all cases of goods sold and delivered. But in *Higgins v. Sargent* (e), *Holroyd*, J.,

(a) 2 B. & Adol. 705.

(b) 7 T. R. 446.

(c) 8 M. & W. 228.

(d) 12 M. & W. 616.

(e) 2 B. & C. 352; 3 D. & R. 613.

says, "I am of opinion, on the principles of the common law, that interest is not payable upon a sum certain payable at a given day. The action of debt was the specific remedy appropriated by the common law for the recovery of a sum certain. Now, in that action, the defendant was summoned to render the debt, or shew cause why he should not do so. The payment of *the debt* satisfied the summons, and was an answer to the action." In truth, the damages in debt are merely nominal, in order that the plaintiff may have his costs under the statute of Gloucester. To an action of debt for rent, the defendant may plead a levy by distress: Com. Dig., Pleader, (2 W.), 47: yet there, as much as here, the plaintiff sues as well for the detention of the debt as for the debt itself. In an action on a bond of indemnity, the Court will order satisfaction to be entered on the record, on the defendant's paying the penalty of the bond and the costs of the action: *Wilde v. Clarkson* (a). There the case of *Earl of Lonsdale v. Church* (b) was relied on in the argument, to shew that, in an action on a bond, damages may be recovered beyond the amount of the penalty: but Lord *Kenyon* said, "I cannot accede to the doctrine in the case cited by the plaintiff's counsel: according to that, an obligor, who became bound in a penalty of £1000, conditioned to indemnify the obligee, may be called upon to pay £10,000, or any larger sum, however enormous. Suppose the plaintiff proceeds in this action, and no defence is made to it, the judgment would be for the penalty of the bond, and one shilling nominal damages for the detention of the debt. And in *Branscombe v. Scarbrough* (c), the Court of Queen's Bench held, that in an action on a bond no damages could be recovered beyond the amount of the penalty, and were disposed to think that Lord *Tenterden* was wrong, in *Hellen v. Ardley* (d), in allowing nominal damages for the detention of the debt.

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(a) 6 T. R. 303.

(c) 6 Q. B. 13.

(b) 2 T. R. 388.

(d) 3 C. &amp; P. 12.

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But, whatever may be the case at common law, it seems clear, that, under the rule of Court of Trinity Term, 1 Vict., this judgment is irregular. The course of pleading is there expressly prescribed: when money is paid into court, such payment is to be pleaded in all cases, “and, as near as may be, in the following form, *mutatis mutandis*.” And, in *Bailey v. Sweeting*, Parke, B., says:—“The Judges took the trouble to draw a statutory form, which answers the demand in substance, and the defendant ought to have pursued the form so given; and not having done so, I think the plea is bad. The observations of Lord Abinger, C. B., in *Henry v. Earl*, were extra-judicial, and not necessary to the decision of the case.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a case argued some time ago, where the question was, whether a plea in an action of debt was bad, or rather incomplete, which did not take notice of the damages claimed in the declaration beyond the debt.

It must be conceded, that the form of plea given by the rules is not accurate, as it omits to notice those damages expressly. In an action of debt, no doubt the plea must state that the defendant never was indebted to the plaintiff in a greater amount; but the question is, whether it must not also notice the damages for the detention of the debt. We think it must, in order to constitute an answer to the action, because it may happen that damages are a very important part of the plaintiff's claim; as, for instance, in debt on a mortgage-deed, where the principal and interest are to be paid on a given day, the interest after that day can only be recovered as damages, and that interest may equal or even exceed the debt; and, as it is impossible to tell, on the face of the record, whether the damages are substantial or

not, we think the plea ought to be framed so as to include a payment into court on account of the damages; and the plea should be varied accordingly, in order to adapt it to the nature of the case. The rule, therefore, in this case, which is to set aside the judgment signed for the damages, should be discharged; but, as the point is new, and the defendant has been misled by the deficiency in the form of the plea given by the New Rules, it should be without costs; and the defendant may amend his plea, on payment of the costs of the amendment only.

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Rule discharged.

ASTON v. PERKES and Another.

May 2.

**TRESPASS** for breaking and entering the close of the plaintiff, and seizing and laying hold of him, and ejecting him therefrom.

Plea, that the plaintiff ought not further to maintain his action, because the defendants, by leave of the Court first had and obtained, now bring into court the sum of £25, ready to be paid to the plaintiff; and the defendants further say, that the plaintiff has not sustained damages to a greater amount than the said sum of £25, in respect of the causes of action in the declaration mentioned.—Verification and prayer of judgment.

Replication, damages ultra and issue thereon.

At the trial, before *Pollock*, C. B., at the Summer Assizes for Staffordshire, 1845, the jury found a verdict for the defendants.

damages ultra; on which issue was joined, and the defendant obtained a verdict:—*Held*, that the plaintiff was not entitled to judgment non obstante veredicto, because, although the plea of payment into court is prohibited in an ordinary action of assault and battery, by the 3 & 4 Will. 4, c. 42, s. 21, it did not appear upon the record that the defendant was not a person entitled under some other statute to pay money into court by way of amends in such an action.

Justices and other officers paying money into court under particular statutes, are not bound to state in the plea of payment into court the character in which they make the payment.

To an action for assault and battery, the defendant pleaded payment into court of £25, pursuant to the rule of Trinity Term, 1 Vict. c. 7. The plaintiff replied



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In the following Michaelmas Term, *Gray* obtained a rule nisi for judgment for the plaintiff, non obstante veredicto, or for a repleader, on the ground that payment into court was not pleadable to this declaration: 3 & 4 Will. 4, c. 42, s. 21.

*Whateley* and *Unthank* shewed cause (Feb. 7 and April 28).—This rule was obtained on the ground that a defendant is not entitled, under the stat. 3 & 4 Will. 4, c. 42, s. 21, to pay money into court in an action for assault and battery. It must be admitted that an assault and battery is charged in this declaration, and therefore the defendant was not entitled to plead the plea under this act. But although an action for assault and battery is excepted out of the operation of that statute, still it does not necessarily appear upon the record that this plea is bad; for there are many other acts of Parliament which permit money to be paid into court in this form of action. [*Parke*, B.—But in those cases, do not all the pleas bring the parties within the description of the statute?] No. The 24 Geo. 2, c. 44, s. 4, allows justices of the peace to pay money into court by way of amends in cases of assaults upon the person. [*Platt*, B.—At that time the payment was not pleaded.] Justices, as well as others, must now plead the payment into court. A similar provision is contained in the Smuggling Acts, 3 & 4 Will. 4, c. 53, s. 106, and 8 & 9 Vict. c. 87, s. 120, and also in the Excise Management Act, 7 & 8 Geo. 4, c. 53, s. 114, which is incorporated by relation in the 4 & 5 Will. 4, c. 51. All these acts of Parliament contain clauses, shewing that trespasses to the person might be committed in execution of them. [*Parke*, B.—This plea does not shew that the defendants filled any of the characters mentioned in those statutes.] It is not therefore bad, at least on general demurrer, or after verdict. Nothing special in the pleading is in terms required by any of those statutes. Before the New Rules, a party seeking to pay money into court by way of

amends, under the 24 Geo. 2, c. 44, or any other act then in force, would have gone before a judge, and upon satisfying him that he was in fact a justice, or otherwise entitled to the protection of the act of Parliament, he would have obtained an order accordingly; and if the plaintiff, at the trial, recovered less than the money paid into court, he would have been nonsuited. By the New Rules, the defendant is directed, in a case other than an action of debt, to pay money into court under a prescribed form of plea, which in this case has been precisely observed. The defendant, in such a case as this, has to apply to a judge, and satisfy him that some act of Parliament applies to the case, before he can obtain leave to plead the plea.

But, further, the plea may be supported as a plea of satisfaction. [*Parke, B.*—It is not satisfaction, for it is not taken as such.] The defendant pays into court a certain sum of money; the plaintiff takes it out; it then belongs to him; and the issue taken on its sufficiency is found against him. [*Parke, B.*—You cannot make it accord and satisfaction, when the plaintiff refuses to accept it in satisfaction. It would be a good confession and a bad avoidance; and the principle of judgment non obstante veredicto is, that there is a confession of a cause of action, without a sufficient avoidance.]—The following authorities were referred to in this part of the case:—*Calvert v. Moggs* (a), *Gwynne v. Burrell* (b), *Colt v. Bishop of Coventry and Lichfield* (c), and *Griffiths v. Williams* (d).

*Gray, contra.*—It is admitted on the other side, that unless this can be taken to be the case of parties protected by some statute, the plea is bad, and the plaintiff is entitled to judgment non obstante veredicto. But if the defendants be persons coming within the protection of any statute

(a) 10 Ad. &amp; E. 632.

(b) 2 Bing. N. C. 7.

(c) Hob. 164.

(d) 4 T. R. 710.

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which entitles them to pay money into court by way of amends, they should have put on the record an allegation of that fact, and shewed the precise character in which they were so entitled. In the precedent in 3 Chitty's Pleading, 973, there is an express allegation of the character in which the defendant pays the money into court. A traverse of that fact would be a material traverse. [*Parke, B.*—If the judge is to determine in all such cases whether the payment into court is to be allowed, are you not, by requiring the statement of the defendant's character on the record, empowering the jury to decide that which the Legislature says is to be decided by the judge? The object of the rule was merely that the necessity of putting in the judge's order should be obviated. Your argument must be, that, under the words "mutatis mutandis," everything must be pleaded completely on the record.] If the facts be introduced into the plea, it prevents the inconvenience of trying the same cause twice over, first at chambers, and afterwards at Nisi Prius.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—In Michaelmas Term last, Mr. *Gray* moved for judgment non obstante veredicto in an action of trespass quare clausum fregit, in which the declaration stated the entry, and that the defendants seized and laid hold of the plaintiff, and ejected him; and the defendants having paid £25 into court, by leave of the Court, the plaintiff replied damages to a greater amount, on which issue was joined, and a verdict found for the defendants. Mr. *Gray* insisted that the plea contained a confession (as it certainly did), and a bad avoidance; because, under the statute 3 & 4 Will. 4, c. 42, the Court or a judge had no power to permit money to be paid into court for an assault and battery, as this is.

Mr. *Whateley* and Mr. *Unthank* shewed cause in the present term, and their argument was, that, although the plea would not be sanctioned by the 3 & 4 Will. 4, yet there were cases in which persons filling a particular character had a power of pleading in this form to actions of battery, and therefore the plea was not necessarily bad.

The instances were those of justices and excise officers. The 24 Geo. 2, c. 44, s. 4, enables a justice (in an action for anything done in the execution of his office), by leave of the Court, to pay into court such sum as he shall think fit, whereupon such proceedings, orders, and judgments shall be had, made, and given in by such court, as in other actions where the defendant is allowed to pay money into court. The 3 & 4 Will. 4, c. 53, s. 106, which received the royal assent fourteen days after c. 42, gives a similar power to excise officers. The 8 & 9 Vict. c. 87, which was also cited, does not apply, for it did not receive the royal assent till the 4th of August, 1845, which must have been after the trial of this cause. At the time of passing the act of 24 Geo. 2, and 3 & 4 Will. 4, c. 53, the mode of paying money into court was by an order striking the amount of the money paid out of the amount of damages, and preventing the plaintiff from recovering unless he proved beyond the amount paid into court. The consequence was, that the Court or judge making the order not only exercised the discretion as to allowing the payment, but determined whether the defendant was a justice or officer, and whether he was acting in execution of his office in the matter which was complained of in the action.

After the passing of the act of 3 & 4 Will. 4, c. 53, the New Rules were made by the judges, and the money paid into court must, no doubt, be paid according to the rules, whether by a justice or excise officer; and the question is, what form of plea is required by the New Rules in such cases.

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The rule 17 is, that the payment shall be pleaded *in all cases, and as near as may be* in the form set out, *mutatis mutandis*; which form is amended by the rule of Trinity Term, 1 Vict. If it had been intended, that, in the special cases of justices and officers entitled to pay money into court by different statutes, the character of the defendant should be stated in the plea, it is very reasonable to suppose that the rule would have provided for such a statement. It has not done so; all notice of the character of the defendant is omitted, and there are very strong reasons why it should be; for the effect would be to give the plaintiff the power of taking issue on the fact of the defendant being such justice or officer, and also on the fact whether he was acting in the execution of his duty, and thus transferring to the jury the right to decide those questions of fact, which, at the time of the passing of the 24 Geo. 2, c. 44, and 3 & 4 Will. 4 c. 53, and the then prevailing practice, were determinable, and conclusively determinable, by the Court only, or a judge, subject to appeal to the Court. The object of the new rule was only to put the statement of payment of money into court on the record, and so save the defendant the trouble and expense of proving the judge's order.

We all think that the true construction of the rule is, that the form is to be adopted in all cases of payment of money into court in any action, without stating the character of the defendant; and that the provision, that the plea is to be "*as near as may be*" in that form, *mutatis mutandis*, is only to authorise such alteration as may be necessary in order to adapt the plea to the names of the parties, to the form of action, to the sum paid, and the like.

We therefore come to the conclusion that this plea is good; because, for any thing that appears on the record, according to which alone we are to give judgment, it may have been pleaded by a justice or officer, entitled by statute and the New Rules together to such a plea.

Rule discharged.

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BROWN and Another v. WILKINSON and Another.

April 28.

CASE.—The declaration stated, that the plaintiffs, to wit, on &c., were lawfully possessed of a certain ship or vessel, then lawfully being on the high seas, and that the defendants were then possessed of another ship or vessel, then being on the high seas, and had the management thereof; and that the defendants took so little care in the management of their said vessel, that the same, to wit, on &c., ran foul of and struck against the vessel of the plaintiffs, and damaged the same; and that the plaintiffs had by reason thereof been forced and obliged to lay out and expend a large sum of money, to wit, &c. in repairing the said damage, and had also lost divers great gains and profits which they would otherwise have derived and required from the use of their said vessel.

The liability of a shipowner, for the damage done by the collision of his ship with another vessel, is limited, by the stat. 53 Geo. 3, c. 159, to the value of his ship "at the time of," that is, *immediately before*, the collision. He is not, therefore, exempted from liability, where by the same collision his own ship instantly founders.

The defendants pleaded not guilty, but afterwards withdrew their plea, and let judgment go by default.

On the execution of a writ of inquiry, before the Secondary of London, it appeared that the plaintiffs were the owners of a steam vessel called the City of London, and the defendants of the brig Spring; and that this action was brought to recover from the defendants the sum of 547*l.* 1*s.* 4*d.*, the amount of damage done by the Spring to the City of London, by a collision at sea. It appeared, that, on the 10th of November, 1844, the brig Spring, being on her way to Sunderland, in ballast, between Harwich and Orfordness, struck the City of London steamer on her larboard bow, and occasioned the damage in question. The Spring was herself so much injured by the collision, that she sunk immediately, and was entirely lost. She was not insured. The jury assessed the damages at 251*l.* 7*s.* 8*d.*

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*Fish*, in last Michaelmas Term, obtained a rule calling upon the plaintiffs to shew cause why the verdict so found should not be set aside, and a new inquiry had. He moved on the ground that, by the 53 Geo. 3, c. 159, the defendants were liable only to the extent of the value of their own vessel; and that as she was lost at the moment of the accident, and before the completion of the voyage, they were liable for nominal damages only.

*Watson* and *E. James*, in Hilary vacation (Feb. 9), shewed cause.—Two questions arise in this case: first, whether the loss of the defendants' vessel affords any defence to the action; secondly, whether that defence can be set up under a judgment by default, or whether it ought not to have been specially pleaded. The first question turns upon the stat. 53 Geo. 3, c. 159, intituled "An act to limit the responsibility of ship-owners in certain cases." The first section enacts, "that no owner or owners of any ship shall be liable to answer for any loss or damage arising by reason of any act, &c. done without the fault or privity of such owner or owners, to any other ship or vessel, further than the value of his or their ship or vessel, and the freight due or to grow due during the voyage which may be in prosecution or contracted for at the time of the happening of such loss or damage." Before that statute, the ship-owner was responsible for the whole damage done by his vessel. But the effect of the statute, as applicable to the present case, is only to limit the responsibility of the defendants to the value of the vessel *before* the accident took place: and this is a reasonable limitation, because they might have protected themselves to that extent by insurance. It will be contended on the other side, that the value of the defendants' ship is to be calculated at the time of the accident; and as she sunk at the same moment of time, that she was of *no* value, and the defendants are therefore discharged

from all liability: and the case of *Wilson v. Dickson* (a) will be relied upon in support of this view. That case undoubtedly lays it down, that the ship-owner's liability is limited to the value of the ship at the time of loss or collision. But it may be doubted whether the law is correctly laid down in that case. *Cannan v. Meaburn* (b) shews, that in the case of loss of goods on board a ship, the amount of the ship-owner's responsibility, where the completion of the voyage is prevented by the tortious sale of the ship, is the value of the ship at the time of sale, and the amount of freight she would have earned had she completed her voyage, not the amount of freight calculated on at the commencement of the voyage. Neither can it be contended, that the value of the vessel is to be estimated at the time of her arrival at her destination. The meaning of the statute is, that the ship-owner shall not be liable beyond the fair amount of his capital; he is to pay for so much as existed in specie before the collision, and for which he might have insured. The measure of the defendants' liability cannot surely be the value of their vessel after it has been depreciated by their own wrongful act. [They also cited *Gale v. Laurie* (c), and the case of the *Dundee* (d).]

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Secondly, this defence is not available upon a judgment by default; it goes to the discharge of the defendants, and therefore ought to be specially pleaded. Their argument must be, that the statute has given them a complete defence if their ship is of no value, and a partial one only if the ship is of small value.

*Martin and Fish, contra*.—The shipowner's responsibility is limited to the amount of the ship's value *at the end of the voyage*. The previous statutes, 7 Geo. 2, c. 15, and 26

(a) 2 B. & Ald. 2.

(b) 1 Bing. 465.

(c) 5 B. & C. 156; 7 D. & R. 711.

(d) 1 Hagg. 109.



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Geo. 3, c. 86, limited the responsibility of shipowners, and the 53 Geo. 3, c. 159, is in *pari materiâ*. The intention of the legislature was to apply the foreign law to this subject. In *Gale v. Laurie, Abbott, C. J.*, says, "These acts were certainly made to encourage persons to become owners of ships, and in conformity with similar provisions contained in the law of many of the maritime states of the continent of Europe." And Lord *Stowell*, in delivering judgment in the first case of the *Dundee*, says, "Holland having introduced a law for the protection of its navigation, that persons interested in it should not be liable beyond the value of that property of their own which they exposed to hazard, their ship, freight, apparel, furniture, &c., England followed in successive statutes, by which it protected owners from responsibility beyond those interests." It is, therefore, important to ascertain what was the law of other European maritime states on this point. By a French ordinance of the reign of Louis XVI. (*a*) "the owners of ships shall be answerable for the acts (*faits*) of the master, but shall be discharged therefrom upon relinquishing their ship and freight." The word "*faits*" clearly means acts of physical force. In "*Abbott on Shipping*," p. 135, 7th edit., there is this note: "In France, the master of a ship was formerly held to possess this power of charging the person of his owners for money borrowed for the necessities of the ship in the course of a voyage; but Emerigon, tom. 2, p. 458, cites from decisions of the courts of his country, by which the owners are declared not to be personally responsible, the ship having perished on the voyage; but in each of those cases the master was held liable to pay the debt." There is also an ordinance of Rotterdam, in the year 1721 (*b*), which declares "that the owners shall not be answerable for any act of the master done without their

(*a*) Referred to in *Abbott on Shipping*, 395, 7th edit. (*b*) *Ib.*

order, any further than their part of the ship amounts to." Vander Linden, in his Treatise on the Dutch Law, translated by Henry, lays down the law as established in Holland, to the same effect. And Vinnius, in his Notes on the Treatise of Perkins, p. 155 (*a*), says, "By the law of Holland, the owners are not chargeable beyond the value of the ship and things that are in it." To the same effect is Grotius, *De Jure Belli*, lib. 2, c. 11, s. 13. And the American law is the same: see Story on the Conflict of Laws, s. 7, p. 439. So that, if a ship of the value of £50 were to do damage to another to the extent of £1,000, if the owner gives her up, he is not further liable. The 7th section of the 53 Geo. 3, c. 159, shews that this is so; for by that section the owner may pay the value into court. This construction of the act meets the difficulty that might be suggested in the case of *two* collisions taking place; for if a ship were to inflict two separate injuries upon two other vessels, the owner would be responsible to both, in case she reached the end of her voyage. In this case there was no insurance, and the responsibility of the owner does not depend on what the ship *might* have been insured at, for the act says nothing about insurance, nor is any mention made of insurance in connection with this question, by Lord *Tenterden*, in his book on Shipping. [*Parke*, B.—If by the total loss of the ship there was an end to all liability, ought you not to have pleaded that?]

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—In this case the plaintiffs sued the defendants, the registered owners of the brig *Spring*, for negligence of the defendants' servants in the navigation of their vessel, by which the plaintiffs' vessel was injured. The

(*a*) Referred to in Abbott on Shipping, 305, 7th edit.

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defendants suffered judgment by default, and on the inquiry the jury assessed the damages at £251. Mr. *Fish* moved, in Michaelmas Term last, for a new inquiry, on the ground that, by the same stroke which did damage to the plaintiffs' vessel, the defendants' received her death wound, and soon after sunk; and was therefore, he contended, of no value at the time of the plaintiffs' loss, and so, by the 53 Geo. 3, c. 159, s. 3, the damages ought to be merely nominal.

At the close of Hilary Term, cause was shewn against this rule by Mr. *Watson*, and the rule supported by Mr. *Martin* and Mr. *Fish*; and the case was fully argued. The two latter contended, that the object of the statute 53 Geo. 3, c. 159, s. 3, was to give to British shipping *all* the protection which the navigation laws of some foreign states extend to theirs; and this protection goes to the extent of permitting the owners, at the end of the voyage, to give up the vessel in its then state, by way of satisfaction to the parties injured; and if it be lost, the owners are altogether exempt, on abandoning the benefit of insurance, if any, and salvage; and supposing the act to have been framed on this principle and to have this effect, they argued that in the case which happened, the defendants' vessel having been totally lost immediately after, the defendants were entirely exempt from all liability.

If this argument were well founded, the consequence would be, that the defendants ought to have pleaded the fact of the total loss, for the loss would be matter of defence to the action altogether. The judgment by default admits their liability to pay some damages.

But the argument cannot be supported. It may indeed be true, that the legislature, in giving relief by the series of statutes on this subject, ending with the 53 Geo. 3, have had the foreign codes in view, and proceeded in their spirit; but they certainly have not introduced the whole of the provisions of those codes. There is not a word in the

statute protecting the shipowner from all liability, if his ship be lost, or requiring him to give up the benefit of any policies of insurance, under any circumstances whatever. All that is done is, to restrict the liability of the shipowner to the value of the ship and freight, *at some time*, but no more. The act supposes that there is always some value, to the extent of which the owner is to be liable. In the case of a single loss, it restricts the liability to that value simply; where there are several losses, it gives a right to file a bill for the equal distribution of *that value* among the several claimants. The statute, in the event of one loss only, does not give the shipowner a right to file a bill, and so make a court of equity decide on and apply the value of the ship; but it leaves the amount of damage sustained, and the amount which the defendant is to pay, to be settled by a court of law. Hence, in the present case, the defendants must be liable to some amount, and must pay the whole or part of some value of their own ship.

At what time the value should be estimated, if the matter were *res integra*, would be a considerable question. But the Court of King's Bench has already decided that the value is not to be calculated at the time of *the commencement of the voyage*, but at the time of the loss; and in so doing, they have not adverted to a difficulty which would arise if there are *several losses*; for the statute, in the 7th section, clearly contemplates that one value is to be paid into court; and if there are several losses, at the time of which loss is the value to be taken? This section does not appear to have been considered by the Court in *Wilson v. Dickson*; and probably, if it had been adverted to, the value risked in the adventure, that is, the value at the commencement of the voyage, which is that which naturally would be the amount of the shipowner's insurance, and which would be the same whatever the number of accidents might be during the voyage, would have been considered as the value contemplated by the act.

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From the practice in the Court of Admiralty no light could be derived on this question; for that Court proceeds *in rem*, and can only obtain jurisdiction by seizure, and the value, when seized, is the measure of liability. As, however, the point has been decided by the case referred to, we should pause before we overruled that authority. It is not, however, necessary in this case to do so; for we think that, according to the true meaning of that decision, the value at the time of the loss, to which the damages were there restrained, is the value at the moment the loss commences, by the collision with the defendants' ship, whence the injury: and it is not to be reduced by the consideration that the defendants' vessel is about to founder, at which time it really is of no value; for that would be to exempt the defendants altogether, which the statute certainly does not contemplate under any circumstances. Now, in this case, it is immaterial whether we take this value, or the value of the defendants' vessel at the commencement of the voyage, as the limit of the damages to which the defendants are liable.

The verdict is therefore correct, and the rule must be discharged.

Rule discharged.

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## PRATT v. HAWKINS (a).

**THIS** was an action by indorsee against acceptor of a bill of exchange for £25, dated 14th May, 1838. The defendant pleaded, that the alleged cause of action did not accrue to the plaintiff within six years next before the commencement of this suit; which was traversed by the replication.

The original writ of summons in this action was sued out into Middlesex, on the 15th of August, 1844. No service of that writ was effected, and on the 14th of January, 1845, it was returned non est inventus, and filed, and an entry of the writ and return duly made on the roll; and on the same day an alias writ of summons was issued into Middlesex. On the 10th of June, 1845, the plaintiff's attorney sued out a pluries writ of summons into Surrey, which on the same day was served on the defendant, and to which he duly appeared. On the 18th of June the plaintiff declared, and on the 26th the defendant pleaded. The alias writ of summons was not in fact returned or entered of record until the 4th of July. The Nisi Prius record, however, as made up and produced at the trial of the cause, before Lord *Denman*, C. J., at the last summer assizes for Kent, stated only that the defendant was summoned to answer the plaintiff "by virtue of a writ issued on the 15th day of August,

In an action on a bill of exchange, dated in May, 1838, the original writ of summons into Middlesex was issued on the 15th of August, 1844; on the 14th of January, 1845, it was returned non est inventus and filed, and entered of record; on the same day an alias writ of summons was issued into Middlesex; on the 10th of June, 1845, a pluries writ of summons was issued into Surrey, and served the same day, and the defendant duly appeared to it; the plaintiff declared, and the defendant pleaded, that the cause of action did not

accrue within six years next before the commencement of the suit. The alias writ of summons was not in fact returned or entered of record till the 4th of July, 1845. The Nisi Prius record was made up, stating only that the defendant was summoned to answer the plaintiff by virtue of a writ issued on the 15th day of August, 1844, and on its production at the trial the plaintiff obtained a verdict.

The Court held, that the provisions of the stat. 2 Will. 4, c. 39, s. 10, had not been complied with, and made absolute a rule to amend the Nisi Prius record, by stating the continuances according to the truth, at the costs of the plaintiff.

Where a writ issued within six years after the cause of action accrued has not been duly continued, pursuant to the 2 Will. 4, c. 39, s. 10, the defendant is not bound to plead such non-continuance specially, but may take advantage of it under the general plea, that the cause of action did not accrue within six years next before the commencement of the suit; for, *for this purpose*, the last writ which is served, is the commencement of the suit.

(a) Decided in Hilary Vacation, Feb. 7.

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1844." The defendant's counsel tendered an examined copy of the roll, to shew that the proceedings had not been properly continued. *Lush*, for the plaintiff, objected to its admissibility; but *Tindal*, C. J., received it. *Lush* then put in another copy of the roll, subsequently made up, which described the alias as having been "duly" entered of record, but omitted the date. This was objected to, on the ground that the matter ought to have been placed on the record by way of replication; and that the only question involved in the issue was, whether the cause of action accrued within six years before the 15th of August, 1844. The Lord Chief Justice was of this opinion, and the plaintiff obtained a verdict for the amount of the bill and interest.

In Michaelmas Term, *Gurney* moved, on an affidavit that the latter roll had been made up after the first examined copy had been made, and obtained a rule calling upon the plaintiff to shew cause why there should not be a new trial, or why the roll should not be amended according to the truth, at the costs of the plaintiff or his attorney.

*Lush* now shewed cause.—It is said that the plaintiff has not in this case complied with the Uniformity of Process Act, 2 Will. 4, c. 39, s. 10. That section enacts, that no writ issued by authority of the act shall be in force for more than four calendar months from the day of its date inclusive, "but every writ of summons may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been served therewith: provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall have been served therewith, &c., or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned non est inventus, and entered of record, within one calendar month next after the expira-

tion thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ," &c. Here, undoubtedly, the duration of the alias writ of summons expired on the 13th of May, 1845, and it was not in fact entered of record within a calendar month after that date. But then the question arises, whether the defendant was not bound to plead specially that the suit was not well continued by the pluries writ. The original writ of summons is still the *commencement of the action* for every purpose, although the *continuation* of it is not, under these circumstances, available for the limited purpose of preventing the operation of the Statute of Limitations. Here the plea merely alleges that the cause of action did not accrue within six years next before the *commencement of the suit*. It is not involved in this issue, whether the first writ was properly *continued*. The first writ was a good commencement of the suit, and continued so for all purposes, until the alias writ was not duly entered of record. The defendant, therefore, ought to have pleaded specially that it was not well continued. [*Alderson*, B.—The action is, for this purpose, commenced by the writ with which the defendant is *served*, unless you shew it to be properly connected with the preceding writs. *Parke*, B.—These writs would connect well enough for every other purpose but the limited one provided for in the 10th section of the Uniformity of Process Act.] No doubt; and the non-entry of the alias writ in due time does not render the original writ of summons a *nullity*; it has only failed of effect for the purpose of this plea. *Gregory v. Des Anges* (a) and *Norman v. Winter* (b) are authorities to shew that, in ordinary cases, the alias and pluries may be sued out at any

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(a) 3 Bing. N. C. 85; 3 Scott,  
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(b) 5 Bing. N. C. 279; 7 Scott,  
 251.



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time, and although the preceding writs have not been previously returned. Suppose there were two pleas on the record, one of a tender, and the other of the Statute of Limitations; would the Court say that the "commencement of the suit" means two different things, with reference to the two issues? [*Parke*, B.—How then is the defendant to avail himself of the statute?] As before the Uniformity of Process Act; except that, before the act, the *plaintiff* must put the facts upon the record, and now the *defendant* must do so. [*Parke*, B.—What would be the form of plea?] Like that of a replication of continuing writs before the statute. The framers of the Pleading Rules, when they required the date of the first writ to be put upon the record, must have contemplated that the onus of shewing the operation of the statute was thenceforward to be upon the defendant. He may plead both pleas, viz. *actio non accrevit infra sex annos*, and that the first writ was defeated by not being properly continued. [*Parke*, B.—Suppose the plaintiff's answer to be an acknowledgment in writing, given the day before the commencement of the suit, how would he reply to such a plea?] There would be no need to reply such a fact, because the plea would admit that the original writ of summons was sued out in time. [*Parke*, B.—On the present pleadings both answers are open to the plaintiff. There is certainly some anomaly, inasmuch as, for one purpose, the commencement of the suit may be one day, and for another purpose another day. It is commenced for all purposes, except as to the Statute of Limitations, on the day of issuing the first writ; and for that purpose also on the day of issuing that writ, if the plaintiff complies with the proviso in sect. 10 of the Uniformity of Process Act. That he has done in this case at *Nisi Prius*, but not truly; therefore the record ought to be amended, and the plaintiff to pay the costs. The plaintiff is still by law to maintain the issue; he must prove that the writ was sued out within six years, and to do that he must comply with the requisitions

of the statute: then it is for that purpose the commencement of the suit, but not otherwise.] Where an original writ was replied to a plea of the Statute of Limitations, it was held sufficient to shew the teste of it, without also shewing continuances: *Finch v. Wilson* (a).

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Secondly, the record of the continuances ought not to be amended, for there is nothing in it inconsistent with the truth. It does not state as a fact the entering of the alias writ of record, but merely says that the defendant was summoned to answer the plaintiff by virtue of a writ issued on the 15th day of August, 1844. The record, therefore, at most, is merely *defective* on the face of it, not *untrue*.

PARKE, B.—I think the roll imports that everything was done at the time of the issuing of the original writ, and so states it untruly. It should, therefore, be amended, and correctly state everything which the statute requires. With respect to the other point, no doubt it leads to some anomaly; but, as soon as the Statute of Limitations is pleaded, the plaintiff must answer it, either by shewing a written acknowledgment or part payment within the six years; or, if he is obliged to resort to the continuing writs, by shewing everything done strictly in compliance with the statute, and each of the writs duly returned and entered of record within a month after its expiration. That appears to be the case on this record, but the statement is untrue: the record, therefore, ought to be amended according to the truth, at the costs of the plaintiff.

The rest of the Court concurred.

Rule absolute accordingly.

*Gurney* appeared in support of the rule.

(a) 1 Wils. 167.

1846.

May 1.

REGINA v. WOODROW.

A dealer in and retailer of tobacco is liable to the penalty of £200, imposed by the 5 & 6 Vict. c. 93, s. 3, for having in his possession adulterated tobacco, although he had purchased it as genuine, and had no knowledge or cause to suspect that it was not so.

Where an officer of excise, by whom an information for penalties is exhibited, is absent at the time of the hearing, and there is an appeal against the judgment, on the part of the Crown, to the quarter sessions, under the 7 & 8 Geo. 4, c. 53, s. 82, the notices of appeal required by s. 83 may, by virtue of the 4 & 5 Will. 4, c. 51, ss. 22 & 23, be given and signed by any officer of excise who is present conducting the proceedings.

THIS was an appeal from the judgment of two justices of the peace for the borough of Great Yarmouth, in the county of Norfolk, upon an information exhibited by order of the commissioners of excise, by William Hedges, officer of excise in the said borough, against Nevill Fuller Woodrow, a licensed dealer in tobacco by retail, keeping a shop within the said borough; which information was for the forfeiture of £200, for that, before and at the time of the committing of the offence thereafter mentioned, he (Woodrow) was a dealer in tobacco; and that, being such dealer in tobacco, at Great Yarmouth, on the 28th of September, 1844, at &c., he had in his possession fifty-four pounds weight of manufactured tobacco, (not being roll tobacco), to wit, cut tobacco, which tobacco had then and there added thereto, and mixed therewith, certain other materials and things and matter than water only, that is to say, sugar, molasses, and other saccharine matter, to wit, three pounds weight of sugar, three pounds weight of molasses, and three pounds weight of other saccharine matter, to the said William Hedges unknown, contrary, &c.; whereby, &c.; and also for the forfeiture of the tobacco. The information was heard on the 25th of March, 1845, before William Henry Palmer, Esquire, the then Mayor, and William Yetts, Esquire, two of Her Majesty's justices of the peace for the said borough, and was by them dismissed. William Marks, an officer of excise, was present before the magistrates to conduct and did conduct the case, on behalf of the excise; Hedges, the officer by whom and in whose name the information had been exhibited, not being present on its being dismissed. Notices of appeal, signed by the said Marks, in his own name, and not as the agent of Hedges, were served upon the justices and the respondent; and in

due time notice of trial of the appeal at the sessions was served, which was signed by Hedges. At the trial of the appeal, at the Quarter Sessions held for the said borough, on the 24th day of June, 1845, it was objected by the counsel for the respondent, that due notice of appeal and of the trial had not been given, the first notice being signed by Marks and the second by Hedges. The Court overruled the objection, reserving the point.

Upon the merits being gone into, the Court found that the respondent was a licensed dealer in tobacco by retail, and that he kept a shop in Great Yarmouth; and that, upon the 28th September, 1844, an officer of excise had seized in the respondent's shop, in a drawer where he kept his tobacco for the purposes of sale, fifty-four and a half pounds of manufactured tobacco, which, on being subjected to the usual tests, was found to have added thereto and mixed therewith four per cent. of saccharine matter; that the adulteration had been made in the course of the manufacture, and not afterwards; and that the respondent had purchased the tobacco of a manufacturer as genuine tobacco, and believed that the tobacco seized was genuine, and that he had no knowledge nor cause to suspect that the tobacco he so purchased, and which was seized, had any saccharine matter added to or mixed therewith, or that it had been manufactured in any other way than as directed by law.

The Court of Quarter Sessions dismissed the appeal, subject to a case for the opinion of the Court of Exchequer, upon two points:—1st, Whether the notices of appeal and trial were sufficient. 2nd, Whether the respondent had been guilty of the offence charged in the information.

The judgment of Quarter Sessions to be quashed or confirmed, as the Court may decide upon the above questions. If the order of sessions should be quashed, then the respondent to be convicted in the mitigated penalty of £50, and the tobacco seized to be forfeited.

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*J. Wilde*, for the Crown.—First, as to the sufficiency of the notices of appeal. The act of Parliament under which these proceedings were taken is the general Excise Regulation Act, 7 & 8 Geo. 4, c. 53; the 82nd section of which enacts, that “in case any officer who shall exhibit any information, or any person or persons against whom any information shall have been exhibited, &c., before any justice or justices of the peace as aforesaid, shall feel aggrieved by the judgment given therein by such justices, it shall be lawful for such officer or such person or persons, *upon giving such notice as hereinafter mentioned*, to appeal therefrom to the justices assembled at the next general Quarter Sessions of the peace; and it shall be lawful for the justices of the peace at such general Quarter Sessions, upon being served with such notice, and they are hereby respectively authorised and required, to hear, adjudge, and finally determine such appeal: and if, upon any such appeal, any defect in form shall be found in the information or in any part of the proceedings thereon or relating thereto, or in the record thereof, every such defect of form shall thereupon be rectified and amended by order of such justices, or the major part of them.”

Then sect. 83 points out what notices shall be required to be given by the appellant party. It says, “that no such appeal as aforesaid shall be allowed, unless the party or parties appellant shall, at and immediately upon the giving of the judgment appealed against, give notice in writing of such appeal to the commissioners of excise or justices of the peace, respectively, from whose judgment such appeal shall be made, and also to the adverse party or parties in such appeal, and shall lodge such notice at the office or with the registrar of the commissioners of appeal, or with the clerk of the peace for the sessions.” It therefore requires three notices of appeal; one to the justices, another to the defendant or other adverse party, and the third to be lodged in the office of the clerk of the peace; and these

three notices are to be given at the time when the judgment of the justices is given. It then goes on to provide, "that no such appeal as aforesaid shall be heard, unless the party or parties appellant shall, within one week at least before such appeal is to be finally adjudged and determined, give notice in writing to the adverse party or parties in such appeal, of the time and place where such appeal is to be heard."

In this case the three notices required by the earlier parts of the section were given, not by the officer Hedges, by whom the information was exhibited, who was then absent, but by another officer who was present conducting the proceedings. The other notice was signed by Hedges. Now there are several sections in another act relating to the excise, the 4 & 5 Will. 4, c. 51, which contemplate and provide for the absence at the time of the hearing before the justices of the officer who filed the information. The 22nd section of that act provides, "that where, in any case, any information for the recovery of any penalty incurred, or for the condemnation of any goods, &c., forfeited under any law or laws relating to the revenue of excise, shall, by order of the commissioners of excise, be exhibited before the commissioners of excise, or any justice or justices of the peace, and the officer of excise by whom or in whose name such information shall be exhibited, shall die, or be removed or discharged, or at the time of the hearing may be absent, such information shall not, by such death, removal, or discharge, or by the absence of such officer, abate or be discontinued, but all the proceedings on such information shall be continued, and may be proceeded in by any other officer, in the name of the officer by whom the same shall have been exhibited," &c. The object of this enactment obviously was, that the proceedings should not drop on account of the particular officer being necessarily absent. It will probably be said, that Marks ought at all events to have signed the notices in the name of Hedges. But the next section of the same act, (s. 23),

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provides, "that if there shall not be twenty days between the time of any judgment being given by any justices of the peace, on any information exhibited to them, and the next general Quarter Sessions of the peace, and the party against whom such judgment shall be given shall appeal against the same, then such appeal may be to the Quarter Sessions next after the expiration of twenty days from the time of giving such judgment." That is a distinct provision, and does not interfere with what follows:—"and *any notice of appeal* shall be given by any officer of excise who shall attend and conduct the proceedings on the part of the revenue of excise, notwithstanding such officer may not be the officer named in the information as informing or exhibiting the same." And this is quite reasonable; because, as the notices of appeal are to be given at the moment, they must necessarily be given by the officer who is there conducting the case. Then with respect to the subsequent notice, it cannot follow, because he signs those notices, being present at the time, that he is therefore bound to sign the other.

Moreover, this is not a point which can properly be reserved for the opinion of this Court. The 7 & 8 Geo. 4, c. 53, s. 84, empowers the commissioners of appeal and Quarter Sessions to state specially, for the opinion and direction of this Court, "*the facts of any case* on which such appeal shall be made." Here the party attended, and the appeal was fully heard. If the notice of trial was not sufficient, the appeal was not properly before the Sessions, and the learned Recorder had no power to state a case. [*Alderson, B.*—A mandamus would have been the way to raise this point.] Yes; if it was not a valid notice, the Recorder should have refused altogether to entertain the application; and if he was wrong in doing so, a mandamus would have gone to compel him to hear the appeal. But further, the Court of Quarter Sessions has power, under s. 82, to rectify all defects of form; and here this defect, if it was one, has been rectified in effect by hearing

the appeal notwithstanding, as if the notice were valid. [*Alderson*, B.—Then if the Sessions wrongly decide to hear the appeal, and convict the party, what is the remedy for the subject, the certiorari being taken away?] Whatever it may be, it would seem not to be by special case for this Court. [*Parke*, B.—The notice is the foundation of the jurisdiction of the Sessions; their decision is *final*; but if it turns out that there was no such notice as to give them jurisdiction, their judgment would be void. *Pollock*, C. B.—If they send up a case to us disclosing an offence, but disclosing also that they have no jurisdiction, I should be sorry, unless I were compelled, to decide that we should affirm the conviction notwithstanding.]

The second question is, whether the respondent had been guilty of the offence charged in the information. That depends entirely on the construction of the stat. 5 & 6 Vict. c. 93. The information states, that the defendant had in his possession 50lbs. weight of manufactured tobacco, to wit, cut tobacco, which tobacco had then and there had added thereto and mixed therewith certain materials and things other than water, namely, saccharine matter. The offence charged, therefore, is that of a retailer of tobacco having in his possession tobacco which had been manufactured with something else than water. Now the preamble of this act of Parliament, after reciting the passing of the 3 & 4 Vict. c. 18, goes on—“And whereas the practice has greatly increased of introducing in the manufacture of tobacco and snuff various articles other than tobacco, either as substitutes for tobacco or snuff, or to increase the weight of tobacco or snuff, by which practice the duties on tobacco are greatly injured, and the revenue further damaged by drawbacks being obtained on adulterated tobacco; and it is therefore expedient and necessary, for protection of the revenue, to make further provision than is contained in the said recited act for preventing such evil practice, and to amend the said recited act: Be it there-

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fore enacted," &c. The present act, therefore, was passed with the view of making more stringent measures than existed before, for the protection of the revenue. Then the 3rd section, on which this information is framed, enacts, "that every manufacturer of, dealer in, or retailer of tobacco, who *shall receive or take into or have in his possession*, or who shall sell, send out, or deliver any tobacco or snuff which shall have been manufactured with, or shall have had added thereto or mixed therewith, or into or amongst which there shall have been put, either before or after being manufactured, or in which there shall be found on examination thereof, any other material, liquid, substance, matter, or thing, than, as respects tobacco, water only," shall forfeit £200. This is an enactment addressed, not to the public generally, but only to the persons carrying on this exciseable trade; and it does not contain the word "knowingly," or any other words importing that a scienter must be proved. The case of *The Attorney-General v. Lockwood* (a) is in point. That was an information against a retailer of beer, licensed under the 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 84, for the penalties imposed by the 58 Geo. 3, c. 58, s. 2, for having in his possession liquorice, being one of the prohibited articles therein enumerated; and it was held to be unnecessary, in order to render him liable, to aver or prove that he had any of them in his possession to be used as a substitute for malt or hops, or with any criminal intention. It was there urged on the part of the defendant, that, if such were the construction, he might be made liable by having in his house a few ounces of liquorice for the use of his family. Such a result, however, is guarded against by the act now under consideration, which, by sect. 5, excepts from the prohibition sugar, molasses, &c., which the party has for the necessary and ordinary use of his family, the proof whereof shall lie upon him. The ob-

(a) 9 M. & W. 378.

ect of the legislature clearly was, to prevent persons carrying on an exciseable trade from having in their possession at all certain articles which they knew to be used for adulterating the articles in which they dealt. For the same reason, by the Customs Act, there is an absolute prohibition on the importation of spirits in casks above a certain size. This act meant, therefore, to cast upon the dealer the responsibility of shewing that the tobacco which had come into his possession was unadulterated. [*Pollock*, C. B.—He is bound to know it. He has his remedy against the manufacturer who supplied him with the article.] There was a case cited at the Sessions, of *Rex v. Marsh* (a). That was the case of a conviction by two justices of the defendant, as a common carrier, for having in his possession pheasants and partridges, contrary to the Game Act. The defence was, that the basket of game was put upon his cart, and that he knew nothing of it until the end of the journey; but he was notwithstanding held to be liable, and the information to be sufficient, although it did not aver that the defendant had the game in his possession *knowingly*, the statute not containing that word. [*Alderson*, B.—Can anybody be said to have anything in his possession, which he does not know of?] There can be no doubt that, in that sense, the defendant had this tobacco in his possession knowingly; and the only question is, whether he knew it was adulterated. The first section of this act of Parliament provides, by a penalty of £300, against the very offence which, if the defendant's construction be correct, is the offence mentioned in the third section—namely, the using or permitting the use of adulterating articles. [*Alderson*, B.—That seems only to apply to cases where the retailer, having proper tobacco in his possession, adulterates it, or permits it to be adulterated, while it is in his possession.] It would seem also to apply to the case of ordering tobacco adulterated.

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(a) 4 D. & R. 261.

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[*Pollock*, C. B.—Unless it applies to every case, your argument from it fails.]

*Crompton*, contra.—First, as to the question whether this case amounts to an offence within the statute. It is clear that this defendant is *morally* innocent, and he has been pronounced to be so by two several tribunals. Then the question is, whether there must not be some limitation put upon the general words of this act, in order to exclude such a case; viz. that the tobacco shall be in some way or other *unlawfully* in the possession of the party. The principle is familiar, that in all criminal and penal cases, unless the party be *guilty*, unless there be something wrong in the transaction, there is no *offence* or crime. Is the party to be liable to this heavy penalty, if he have in his possession an ounce of tobacco, which by any carelessness may have a grain of saccharine matter in it, which may even have been poured upon it by the informer himself, or by a shopman or apprentice from malicious motives? The word “unlawfully” may reasonably be imported into the statute, in order to prevent so monstrous an interpretation. [*Pollock*, C. B.—There can be no doubt that every stringent law, which is made for the purpose of working some great public good, will be attended with frequent cases of hardship, and sometimes with cases of apparently great injustice. That, however, is a matter for the consideration, either of those who make the laws, or of those who call for the execution of them. Suppose it a case, not of protecting the revenue, but of protecting the public health, as where the Beer Act forbids persons to have certain things in their possession at all. So, you are not allowed to have Bank paper in your possession: it is so dangerous that any person should be allowed to have it, that it is absolutely prohibited.] There the parties are wilfully disobeying the act of Parliament. [*Pollock*, C. B.—So you are here wilfully disobeying the act of Parliament, if you do not take due pains to examine the article in

which you deal, and to ascertain, before you receive it, that it is of a character which the law permits you to have.] That might require a nice chemical analysis. [*Parke, B.*—You must get some one to make that nice chemical analysis, or you must rely upon the manufacturer or dealer who sells to you, and take your remedy against him. You may take a warranty from him that it is lawful tobacco. There are very ample reasons for these provisions of the act, on account of the difficulty of convicting in such cases. *Rolfe, B.*—The power given, by the 98th section, to the commissioners of excise, to forbear to prosecute where it shall appear to their satisfaction that any penalty or forfeiture was incurred “without any intention of fraud, or of offending against this act,” shews plainly that the forfeiture may be incurred though the party was morally innocent.]

Secondly, the notices were informal. The appeal against the order of the justices or commissioners is the creature of the act of Parliament, and is given only to a particular person, namely, the officer who exhibited the information; and it is only, therefore, on *his* giving due notice of the appeal, that it can lawfully be entertained. Every thing must be done which the act says shall be done in order to give the Court jurisdiction to hear it. Nor is this a defect of form in the information or proceedings, which can be rectified by the court of appeal; it is a defect which is of the very essence of the proceeding by way of appeal, for it becomes thereby an appeal by the wrong person. And by sect. 83, there can be no such amendment, because there is not to be any such proceeding of appeal at all, unless the notices are regularly given by the party or parties appellant. Here Hedges was the party appellant, and the notices were not given by him. Nor does the 22nd section of the 4 & 5 Will. 4, c. 51, alter the case: the substituted officer may, in the cases there provided for, continue the proceedings, but he must do so by giving the notices in the name of the officer who exhibited the information. With

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respect to the 23rd section, it appears to apply throughout to the case mentioned in the beginning of it, viz. where there is not time to give the twenty days' notice of appeal before the next sessions, after the giving of the judgment by the justices. [*Parke, B.*—It says, “*any* notice of appeal;” that is general.] Then it should be given in the name of the original officer, according to the 22nd section. [*Parke, B.*—All the formal proceedings go on in the name of the officer by whom the information was exhibited; but the case may be in fact conducted by another officer: then the act goes on to say, that any notice of appeal may be given by that officer. Here the notices themselves shew that this is a proceeding to which Hedges is a party. The notices have in effect been given in his name.]

POLLOCK, C. B.—There are two questions submitted for the opinion of the Court in this case. The first is, whether the notices of appeal were sufficient. It appears that the informer was absent; Marks, who was present, and conducted the proceedings on behalf of the excise, being dissatisfied with the judgment of the magistrates, gave notice of appeal, signed in his own name, adding to that, that he was the officer of the excise attending and conducting the proceedings in this case on the part of the commissioners of excise, and stating that William Hedges felt himself aggrieved by the judgment. And the notice leaves no doubt what were the proceedings appealed against, because it says, “I shall appeal and do appeal to the general Quarter Sessions of the peace, to be holden next after the expiration of twenty days from the date hereof, in and for the borough of Great Yarmouth and county of Norfolk, from the judgment given this day by William Henry Palmer and William Yetts, esquires, being two of her Majesty's justices of the peace for the borough of Great Yarmouth, in the matter of an information exhibited on behalf of her Majesty, as well as for himself, by one William Hedges, officer of

excise, against you, for the recovery of the penalty of £200." I am of opinion, that, under the sections referred to by Mr. *Wilde*, of the 4 & 5 Will. 4, c. 51, the information may be continued, notwithstanding the absence of the officer; and if it were necessary to decide that the notice should be in fact in the name of William Hedges, I think it would be sufficient for this purpose: but I think the 23rd section, containing this passage, "and any notice of appeal shall be given by any officer of excise who shall attend and conduct the proceedings," does not apply merely to the case where there are not twenty days between the time of judgment being given by the justices and the next Quarter Sessions of the peace, but applies to all cases where notice is required to be given. I am therefore of opinion that the notices in this case, of appeal and trial, are sufficient. The notice of trial is by Hedges himself.

Then the next question is, whether the respondent has been guilty of the offence charged in the information. It appears to me, that, in this case, it being within the personal knowledge of the party that he was in possession of the tobacco, (indeed, a man can hardly be said to be in possession of anything without knowing it), it is not necessary that he should know that the tobacco was adulterated; for reasons probably very sound, and not applicable to this case only, but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality. If this were the case of provisions, or of any matter that affected the public health, it would not be at all unreasonable to require persons dealing in them to be aware of their character and quality, and to be responsible for their goodness, whether they know it or not;—they are bound to take care. It appears to me that the section referred to, which creates this offence, namely the 3rd section of the 5 & 6 Vict. c. 93, applies to this case, whether the party knows it or not. The section pointed out by my Brother *Rolfe*, in the course of the argument, strongly con-

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firms that, if it were necessary to have any confirmation in addition to the express language of the section itself. It may be said, that in this particular instance it works a great hardship, because it is expressly found, I may take it; that the magistrates, who in the first instance dismissed the information, and the Court of Quarter Sessions, and who decided in favour of the defendant; were of opinion that he personally had no knowledge of this violation of the law. If the law in a particular case works any hardship, it is either for the legislature to alter the law, or for the executive department of this branch of the revenue law to abstain from calling for the enforcement of the statute. But if we are called upon to put our construction upon it, I believe we are all of opinion that the due construction of the 3rd & 4th sections is, that this tobacco was forfeited, and that the party is liable to the penalty, whether he is or is not aware that the commodity has been adulterated in the manner in which this turns out to be. In reality, a prudent man who conducts this business, will take care to guard against the injury he complains of, and which Mr. *Crompton* says he has a right to complain of, and he would not be exposed to it. If he examines the article, he may reject it, and not keep it in his possession; or if he is incompetent to do that, he may take a guarantie that shall render the person with whom he is dealing responsible for all the consequences of a prosecution.

There was another point made by Mr. *Wilde*, upon which I abstain from offering any opinion. I should be very sorry unnecessarily to say, that this Court would give effect to a conviction, where there had been notices given before the magistrates, but where really, from the nature of the notices, the sessions had no right to entertain the case at all. It does not appear to me to be necessary to remark upon that part of the case. I think the notices which were delivered are sufficient within the statute, and that the offence against which the clause of the act is directed is fully brought home to the defendant.

PARKE, B.—I quite agree with my Lord Chief Baron in everything he has said upon this subject. I hardly think it necessary to add a word to what he has said as to the notices. There is a satisfactory answer given to the objection, by looking at the two sections of the 4 & 5 Will. 4, ss. 22, 23. Those sections appear to me to give a full answer to the objection. As to the notice of trial, that is strictly according to the original act upon which the appeal was brought. With respect to the offence itself, I have not the least doubt that the ordinary grammatical construction of this clause is the true one. It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so. The legislature have made a stringent provision for the purpose of protecting the revenue, and have used very plain words. If a man is in possession of an article as the defendant was in this case, and that article falls within the terms mentioned in the statute, there is no question but that the offence is proved. If there is any hardship in the case, it does not rest with those who have only to carry the law into effect to remedy it. There is a provision, referred to by my Brother *Rolfe*, which enables the commissioners to meet such a case. I have not the least doubt that the defendant has been guilty of the offence described in the 3rd section. With respect to the other point referred to by the Lord Chief Baron, as to whether the Quarter Sessions could reserve to us the question as to the validity of these notices, it is unnecessary to give an opinion upon it.

ALDERSON, B.—I am of opinion that the notices are quite sufficient. They are given by Marks, as the officer of excise conducting the case. The notice states that it relates

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to an information exhibited by Hedges in respect of himself and for the Queen, and it states that Hedges feels himself aggrieved by the decision. Surely these things put together are sufficient, in a case, too, in which the notices are not to be set aside, but are to be amended in all matters of form. Marks acts under the provisions of the act, by which one officer in the absence of another is empowered to act for that other officer. But I think the 23rd section relieves us from any difficulty which might arise upon that. The notices are therefore quite regular, and the judgment of the Court was right on that point.

As to the merits of the case, I think the Court was wrong; because the words of the act, though they are no doubt very stringent, are nevertheless very clear, and any retailer of tobacco who has an adulterated article in his possession is liable to the penalty. I cannot say that this man had not the tobacco in his possession, because he clearly knew it. He did not know it was in an adulterated state, but he knew he had it in his possession; and the question of "knowingly," it appears to me, is involved in the word *possession*. That is, a man has not in his possession that which he does not know to be about him. I am not in possession of anything which a person has put into my stable without my knowledge. It is clear, therefore, that possession includes a knowledge of the facts as far as the possession of the article is concerned.

ROLFE, B., concurred.

Judgment for the Crown.

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## KNIGHT v. The Marquis of WATERFORD.

May 7.

THIS was an action of debt, on the stat. 2 & 3 Ed. 6, c. 13, for the treble value of tithes not set out. Plea, nil debet, by statute; on which issue was joined.

At the trial, before *Rolfe*, B., at the last assizes for the county of Northumberland, it appeared that the plaintiff was the rector of the parish of Ford, in that county, and the defendant was the lord of the manor of Ford, the whole of which, together with other lands, is within the parish of Ford. The jury found, "that for sixty years and upwards the defendant and his predecessors in estate had held and enjoyed the manor of Ford freed and discharged from tithe, on payment to the rector of the annual sum of £40, in lieu and compensation of all tithes within the manor; and that it was part of the same custom, that the lord, in consideration of this payment of £40, should have, for himself, his heirs or assigns, from the occupiers of lands within the manor, a tenth of all titheable matters within the said manor." It was contended on the part of the plaintiff, that this was not a "modus, exemption, or discharge" within the meaning of the Prescription Act, 2 & 3 Will. 4, c. 100. The learned Judge, however, was of opinion that the right or custom proved amounted to a modus within the meaning of the act of Parliament, and directed a verdict for the defendant.

On a former day in this Term, *Watson* obtained a rule nisi for a new trial, on the ground of misdirection (a).

The *Solicitor-General*, Sir *T. Wilde*, Serjt., *Knowles*, and

(a) The rule was obtained and argued upon other grounds also, on which no judgment was

given, and the argument relating to them is therefore omitted.

A prescription for the lord of a manor to hold and enjoy the manor freed and discharged from tithe, on payment to the rector of the annual sum of £40, in lieu and compensation of all tithes within the manor; and for the lord, in consideration of this payment of £40, to have, for himself, his heirs or assigns, from the occupiers of lands within the manor, a tenth of all titheable matters within the manor,—is not a "modus decimandi, or exemption or discharge from tithes," within the meaning of the stat. 2 & 3 Will. 4, c. 100.

Quære, whether such prescription is good in law.

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*Crompton* shewed cause (April 30).—The prescription in question, which may be considered as a *double* prescription, is a “modus decimandi, or exemption from or discharge from tithes,” within the meaning of Lord *Tenterden’s* Act. The first branch of the finding of the jury, if it stood alone, would clearly constitute a good modus, and afford a complete answer to the claim of the plaintiff; and the right of the defendant to an exemption, as against the parson, is not affected by the circumstance, that he himself, under the other branch of the prescription, receives the tithes in kind from the occupiers of lands within the manor. It is necessary to consider what is the legal meaning of the word “modus” generally, and what of the word “tithes.” The former is a word the import of which is perfectly independent of the question whether *the land* itself is discharged of the tenths. It is *the mode* whereby *the church* is satisfied *her* claim for the tenths;—the “modus decimandi”—the mode of rendering the tenths to the church. There is no definition of the word which connects it with the discharge of *the land* from the tenths. Another prevailing fallacy is as to the use of the word “tithes.” It means only that portion of the product of the land which is rendered for the service of religion. When severed from the purposes of religion, its character is altered; it is no longer *tithes*, but *tenths*; no longer a spirituality; and therefore it is said that a layman may not take tithes, but he may take tenths. Now the object of this statute is to shorten the period of prescription in regard to every mode of discharge *from the claim of the church*. The defendant’s case is, that he is not bound to set out tithes for the parson, because he has evidence of a bargain whereby the parson is to receive a payment of £40 annually in lieu of them. That is the modus decimandi established in this parish; and it is a good modus as against the parson, although tithes in kind be payable by the occupiers of the land to some other person. The object of the statute, as shewn in the preamble, was to put a stop to

the expense and inconvenience of protracted litigation between the parson and the landowner; and it ought, therefore, to receive a liberal construction. There are, moreover, decided cases, in which prescriptions like the present have been described and sustained as moduses. In *Pigot v. Hearn* (a), the prescription alleged was, that the lord of the manor of Ovingham, in the county of Northumberland, and all his ancestors, and all those whose &c. had used, from time whereof &c., to pay to the parson of Ovingham and all his predecessors £6 for all manner of tithes growing within the said parish; and that, by reason thereof, he and all they whose &c., lords of the said manor, had used, from time whereof &c., to have decimam garbam, sive decimum cumulum garborum seu granorum, of all his tenants within the manor. These were held to be good prescriptions; and the Court said, that “as to the first, they considered that a *modus decimandi* by the lord, for himself and all the tenants of his manor, to bar the parson from demanding tithes in specie, was good, for it might have a lawful beginning, &c.; and as to the second prescription, that it was good to have the tenth shock, for he hath it as a profit à prendre, as parcel of a thing appurtenant to his manor, and not as tithes.” That case is precisely like the present, unless the word “assigns” in the present prescription be held to make a difference; which cannot be, inasmuch as the law itself would introduce the word in such cases: besides, in *Pigot v. Sympton* (b), where a similar prescription was pleaded, the defendant had taken the title to the tithes by assignment. The case of *Pigot v. Hearn* was confirmed in *Dykes v. Thompson* (c). In *Phillips v. Prytherick* (d) it was objected, that no lay person could prescribe for tithes on his own

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(a) Cro. Eliz. 599; Moore, 483; 1 Eagle & Y. 135.

(b) Cro. Eliz. 763; 1 Eagle & Y. 148.

(c) 1 Eagle & Y. 692; 1 Wood's Tithe Cases, 513.

(d) 3 Eagle & Y. 1273.

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estate, and it was said that in *Pigot v. Sympson* the lord had prescribed for tithes as appurtenant to his manor, arising on the lands of other persons. But the Chief Baron said, that *Pigot v. Sympson* was not the first decision on the point; it had been before determined in *Pigot v. Hearn*; and he expressed his opinion that tithe might be prescribed for as appurtenant to land, as well as to a manor, and that on that ground the prescription might be good in law. In *Cowper v. Andrews* (a) it was laid down, that where there is a modus, the money has become the *tithe*, and may be recovered in the spiritual court; and that the tithes in kind are for ever extinguished in their spiritual nature, and are become a *lay fee*. Here, therefore, the tithes have ceased to exist in a spiritual sense, and, legally speaking, there is no *tithe* payable in kind within this manor; and the church being compensated by the payment of this yearly sum, under circumstances which entitle the parson to receive, and bind the lord to pay it, it is immaterial whether there is a total discharge of the land or not.

*Watson, Addison, and Manisty*, in support of the rule (May 1).—This clearly is not a “modus decimandi, or exemption or discharge from tithes,” within the meaning of 2 & 3 Will. 4, c. 100. That statute was not intended to apply at all to the case of a *disputed title* to the tithes, but only to afford relief by shortening the period of prescription in cases of landowners who had paid something in lieu of tithe for a long period, or had been entirely exempt. It can only apply where the land is discharged from the payment of tithes in kind. The party entitled to the *modus* is the party entitled to the *tithes*. The act of Parliament applies only where a claim of modus decimandi or other exemption exists in respect of the land on which the tithes arise. Here there is a render of tithes in kind, although to another

(a) 1 Eagle & Y. 240.

person than the parson. And this was the view taken of this case in the House of Lords, on the appeal from the decree of *Alderson*, B., in equity (a), where Lords *Cottenham* and *Campbell* evidently considered the claim of the defendant not as, properly speaking, a modus, but a claim of *title* to a parcel of tithes, as against the parson (b); and on that distinction the House reversed the decree, on the ground that a court of equity does not lend its assistance in a case of disputed title to the tithes. *Pigot v. Hearn*, and the other cases which have been cited, only shew that in such a case as this the lord of the manor may recover the tithes in kind against the occupiers of the land;—the tithes have passed from the parson to the lord, but the spirituality remains notwithstanding. It is erroneously supposed that there are *two* prescriptions, one to the £40, and another to the tithes; it is one entire prescription, and must be so considered. According to the report in Croke of the case of *Pigot v. Hearn*, which it is somewhat difficult to understand, the Court appear to have treated the two parts of this prescription as distinct and separate rights; but Lord *Coke*, who argued the case upon the second argument, puts the decision (c) upon a different ground, and treats the prescription as giving the lord a title, by the special matter, to the tithes as such, with the right to sue for them in the spiritual court. And the same view is taken by the Court in *Pigot v. Simpson*, where *Gawdy*, J., said, “It may be that the parson, before time of memory, granted those tithes to the lord of the manor, rendering rent, which was confirmed by the patron and ordinary; and this, being before time of memory, may well be so intended; quod Lord *Popham* concessit, and said, that that was the principal reason of the judgment between *Pigot* and *Hearn*.” The statute must surely be taken to have used the word “modus” according to the

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(a) 4 Y & C. 283.

(b) 11 Cl. & Fin. 653.

(c) *Bishop of Winchester's case*, 2 Rep. 45.

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respect to the 23rd section, it appears to apply throughout to the case mentioned in the beginning of it, viz. where there is not time to give the twenty days' notice of appeal before the next sessions, after the giving of the judgment by the justices. [*Parke, B.*—It says, “*any* notice of appeal;” that is general.] Then it should be given in the name of the original officer, according to the 22nd section. [*Parke, B.*—All the formal proceedings go on in the name of the officer by whom the information was exhibited; but the case may be in fact conducted by another officer: then the act goes on to say, that any notice of appeal may be given by that officer. Here the notices themselves shew that this is a proceeding to which Hedges is a party. The notices have in effect been given in his name.]

POLLOCK, C. B.—There are two questions submitted for the opinion of the Court in this case. The first is, whether the notices of appeal were sufficient. It appears that the informer was absent; Marks, who was present, and conducted the proceedings on behalf of the excise, being dissatisfied with the judgment of the magistrates, gave notice of appeal, signed in his own name, adding to that, that he was the officer of the excise attending and conducting the proceedings in this case on the part of the commissioners of excise, and stating that William Hedges felt himself aggrieved by the judgment. And the notice leaves no doubt what were the proceedings appealed against, because it says, “I shall appeal and do appeal to the general Quarter Sessions of the peace, to be holden next after the expiration of twenty days from the date hereof, in and for the borough of Great Yarmouth and county of Norfolk, from the judgment given this day by William Henry Palmer and William Yetts, esquires, being two of her Majesty's justices of the peace for the borough of Great Yarmouth, in the matter of an information exhibited on behalf of her Majesty, as well as for himself, by one William Hedges, officer of

excise, against you, for the recovery of the penalty of £200." I am of opinion, that, under the sections referred to by Mr. *Wilde*, of the 4 & 5 Will. 4, c. 51, the information may be continued, notwithstanding the absence of the officer; and if it were necessary to decide that the notice should be in fact in the name of William Hedges, I think it would be sufficient for this purpose: but I think the 23rd section, containing this passage, "and any notice of appeal shall be given by any officer of excise who shall attend and conduct the proceedings," does not apply merely to the case where there are not twenty days between the time of judgment being given by the justices and the next Quarter Sessions of the peace, but applies to all cases where notice is required to be given. I am therefore of opinion that the notices in this case, of appeal and trial, are sufficient. The notice of trial is by Hedges himself.

Then the next question is, whether the respondent has been guilty of the offence charged in the information. It appears to me, that, in this case, it being within the personal knowledge of the party that he was in possession of the tobacco, (indeed, a man can hardly be said to be in possession of anything without knowing it), it is not necessary that he should know that the tobacco was adulterated; for reasons probably very sound, and not applicable to this case only, but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality. If this were the case of provisions, or of any matter that affected the public health, it would not be at all unreasonable to require persons dealing in them to be aware of their character and quality, and to be responsible for their goodness, whether they know it or not;—they are bound to take care. It appears to me that the section referred to, which creates this offence, namely the 3rd section of the 5 & 6 Vict. c. 93, applies to this case, whether the party knows it or not. The section pointed out by my Brother *Rolfe*, in the course of the argument, strongly con-

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cree, a court of equity not lending its assistance in such a case of disputed title to the tithes.

This being, therefore, a prescriptive title to a parcel of tithes, and the immemorial payment a prescriptive rent for them, the statute appears to all of us not to apply.

The pension is not a *modus*, according to the legal definition of that term, (*De modo decimandi*, 13 Rep. 12); it is not given in satisfaction of tithes, for the occupier has always been liable to pay tithes, and has paid them, either by render or retainer, though not to the rector. A *modus* and a liability to pay tithe in kind for the same land cannot co-exist,—they are absolutely inconsistent. Nor do we think that this is a “modus” in the sense of that term as used in the act, for we see no reason to believe that the framer of the statute used it in any other than its proper sense; and this appears by sect. 1, which provides, that if a *modus* has been paid for thirty years, it may be defeated by shewing *the payment* of tithes in kind, that is, the payment to any one; and the word must be used in the same sense in the subsequent part of the clause; so that a *modus*, in the sense given by the act, is as inconsistent with the render of tithe, as it is according to its proper legal acceptation; and it is clear that it is not an “exemption or discharge,” the lands from which the tithe is claimed in this suit being liable to the payment of tithes, according to the alleged prescription.

In truth, this is a contest between the rector and the lord as to the title to a parcel of tithes, admitted to be due from the occupier to some one. The statute never was meant to apply to disputed titles to the ownership of tithes, or to make a bad title to a parcel of tithes good. It was enacted in ease of *the occupier*, who had not paid tithe in kind at all, but been totally exempt, or had paid something in lieu of it for a long period; and relief is given by shortening the time of prescription, and thus facilitating the proof of his title to exemption, or to pay the tithe otherwise than in kind.

We all, therefore, think there must be a new trial; when the question to be decided, on the whole evidence, will be, whether the payment of £40 a year was *immemorial* or not. If it should be proved to be such, the question will arise, whether the prescription for the lord and *his assigns* to take the tithes be good,—a point which has not been fully argued, and upon which we do not feel called on to give any opinion in the present stage of the proceedings.

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Rule absolute.

DIXON v. SLEDDON.

May 7.

THE defendant in this case, who resided at Stockport, being indebted to the Liverpool Borough Bank, (of which the plaintiff is one of the public officers), in the sum of £1445, he was served by the Banking Company with a notice, under the stat. 1 & 2 Vict. c. 110, s. 8, of their intention to sue out a fiat in bankruptcy against him at the end of twenty-one days. He thereupon made an offer to pay £300 of the debt in the course of a few days, and to give a cognovit for the residue. By the direction of the attornies of the Banking Company, he called on an attorney of the name of Reddish, at Stockport, to sign the cognovit; and being informed by him that he must have an attorney to attest the execution of it on his behalf, he chose Mr. Reddish for that purpose, and in his presence signed the following document, the execution of which was attested by Mr. Reddish, conformably to the stat. 1 & 2 Vict. c. 110, s. 9:—

The "Order of the Judges" of 12th June, 1845, printed ante, Vol. 14, p. 335, is not a rule of court, but a mere regulation for the guidance of the judges at chambers; and, therefore, where a Judge's order for judgment had been obtained on a written consent, signed by a defendant, and attested by an attorney acting also for the plaintiff, the Court refused to set aside the order and judgment signed thereon.

"Between William Dixon, one of the public officers of certain persons united in co-partnership for the purpose of carrying on the trade and business of bankers in England, according to the statute in such case made and provided,

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called the 'Liverpool Borough Bank,' plaintiff, and Thomas Sleddon, defendant. I, the above-named Thomas Sleddon, hereby consent to an order for immediate final judgment for the sum of £300, besides the plaintiff's costs of suit, to be taxed as between attorney and client, and that the plaintiff may at any time after such judgment sue out execution, and levy the sum of £1445 (being the debt in this action), together with interest thereon at the rate of £5 per cent. per annum, from the 29th of January, 1846, until payment, and the costs aforesaid; together with the costs of execution, poundage, sheriff's and officer's fees, and all other subsequent incidental expenses, whether by fieri facias or capias ad satisfaciendum; and I consent that it shall be part of the terms of such order, that it shall not at any time or in any event be necessary, previous to issuing the said execution, to revive the said judgment, or to sue out or execute any writ of scire facias. And I hereby waive service upon me of any notice of taxation of costs, and of the copy of the order to be drawn up on this my consent. Dated this 30th day of January, 1846."

A judge's order for signing judgment, founded on this consent, was accordingly obtained, and judgment was signed thereon. The defendant paid only £150 out of the £300, and the plaintiff then issued execution for the whole amount of the original debt.

*Jervis* had obtained a rule to shew cause why the judge's order, the judgment signed thereon, and all subsequent proceedings should not be set aside, on the ground that the effect of the rule of the judges, promulgated on the 12th of June, 1845 (*a*), was to place consents of this nature on the same footing, with respect to their attestations, as warrants of attorney and cognovits; and therefore, as Reddish was substantially the attorney acting for the Banking Company

(*a*) 14 M. & W. 335.

in the preparation of the document, he was incompetent to attest it on the part of the defendant:—or, at all events, why the amount levied under the execution should not be reduced by the £150 which had been before paid.

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*Martin* (with whom was *Crompton*) now shewed cause.—The document signed by the defendant, being nothing more than a consent to a judge's order, does not come within the enactment of the 1 & 2 Vict. c. 110, s. 9: *Baker v. Flower* (a). And with respect to the "Order of the Judges," dated 12th June, 1845, and promulgated in the reports of this Court, that is not a rule of court, nor binding upon the parties, nor upon the judge at chambers, unless he thinks fit so to exercise his discretion. It was a mere regulation, drawn up by some of the judges, to guide the discretion of the judges at chambers in these cases; but it is no part of the law of the land, nor a rule of court, nor can it be judicially noticed without proof. [They then argued, that even if this document must be attested in the same manner as a cognovit, the attestation was good; for Reddish was not the plaintiff's attorney, but a mere correspondent, to whom the paper was sent to get it executed, the defendant residing at Stockport, and who acted for the defendant at his own express request.]

*Jervis* and *Burnie*, contra.—The order of the judges is equivalent to a rule of court. It seems to have been handed by the Bench to the reporters, to be published by them for the information of the profession. [*Rolfe*, B.—The judges requested three of their body to consider how this matter might be best regulated, and they produced that order.] It is therefore in the nature of a rule of court. And its terms are the same in effect as those of the stat. 1 & 2 Vict. c. 110, s. 9, and it should therefore receive the same construction.

(a) 8 M. & W. 671.

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Now, upon the statute, it has been decided that the attorney for the plaintiff cannot attest the defendant's execution of a cognovit or warrant of attorney; and that the same rule applies to the agent of the plaintiff's attorney: *Mason v. Kiddle* (a), *Pryor v. Swayne* (b). [*Parke*, B.—But for the case of *Mason v. Kiddle*, I should have doubted whether a mere agent such as this could in any sense have been deemed the attorney of the plaintiff.] If that case be good law, this document was not properly executed; and if so, the order made on the production of it, professing as it does to comply in terms with the statute and with the rule, ought to be set aside. Unless the judge had believed, from the terms of the attestation, that the rule had been complied with, he would not have made the order.

PARKE, B.—The order which has been referred to certainly is not a rule of court. There was some doubt among the judges whether orders for judgment ought to be made on consents of this kind, but it was thought advisable to sanction them, as in many cases they might prove a great saving to defendants; and thereupon the order in question was drawn up by myself and my Brothers *Wightman* and *Erle*, and posted up at chambers. It is not a rule of court, but merely a regulation amongst ourselves, to govern us in the exercise of our discretion in making those orders at chambers. Here the consent was drawn up by an attorney in the country who may have known nothing of this regulation. If it had been a rule of court, it would have been his duty to have known of it.

ROLFE, B., and PARKE, B., concurred.

Rule absolute to return the £150 improperly levied, with costs as to that sum; discharged as to the residue.

(a) 5 M. & W. 513.

(b) 2 D. & L. 37.

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DOE *d.* LLOYD and Others *v.* ROE.

May 7.

**T**HIS was an action of ejectment, brought by the plaintiffs as the co-heirs of a Mrs. Ann Jones, who died intestate, to recover certain houses, &c. in the town of Llanrwst, in Denbighshire. The notice at the foot of the declaration stated the premises to be in the possession of Samuel Mouldsdales, Moses Jones, and several others. Copies of the declaration and notice having been served on the several persons in possession, an agreement for a consent rule was delivered to the attorneys for the lessors of the plaintiff, on behalf of William Hall and Hannah his wife, who were thereby made defendants as landlords for the whole of the premises comprised in the declaration. A few days afterwards, another agreement for a consent rule was delivered to the attorneys for the lessors of the plaintiff, on behalf of Samuel Mouldsdales, who was thereby made defendant, as landlord for certain premises specifically mentioned in the rule, being the whole of the premises claimed in the ejectment, except a house and shop in the occupation of Moses Jones. The usual landlord's rules, and pleas of not guilty, were also delivered. It appeared that Moses Jones also occupied under Mouldsdales an outhouse, to which the lessors of the plaintiff made no claim.

Where two persons delivered separate consent rules in ejectment, each claiming to defend as landlord, the one for the whole of the premises claimed in the action, the other for a part of them, specifically named in the rule, under adverse titles, the Court ordered the consent rules to be amended, by confining them respectively to such parts of the premises as were really in the occupation of each party or his tenants.

In this state of the cause, *J. Brown*, for the lessors of the plaintiff, obtained a rule, calling upon Samuel Mouldsdales, and William and Hannah Hall, to shew cause why the consent and landlord's rules should not respectively be amended, by confining the same to such parts of the premises in the declaration mentioned, as were really in the respective occupations of the said Samuel Mouldsdales, and William and Hannah Hall, or their actual tenants; and why the said Samuel Mouldsdales, and William and Hannah Hall, should not pay the costs of this application.

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*Jervis* and *Welsby* now shewed cause, and contended, that the case was analogous to the old practice of including different landlords in the same consent rule; and that there could be no objection in law to both these parties defending, on separate titles, for the whole or for the same parts of the premises, if they thought fit. The plea of not guilty in ejectment had now been held to be partible; and the lessors of the plaintiff would have their costs against one or the other of the parties in respect of such part of the premises as they did not prove title to.

PER CURIAM.—These parties do not concur in disputing the plaintiff's claim under the same title; they are at variance between themselves, and cannot both be landlords of the same premises. The rules ought, therefore, to be amended, by confining them to such parts of the premises as each party really defends for.

The rule was thereupon ordered to be made absolute, without costs, to amend the consent rule delivered by Mouldale, by striking out of it the name of Moses Jones; and to amend the consent rule delivered by Hall and wife, by confining the same to the house and shop occupied by Moses Jones; the lessors of the plaintiff undertaking to deliver to Mouldale a particular of the premises sought to be recovered, which should exclude the outhouse held under him by Moses Jones.

Rule accordingly.

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## LAMBE v. SMYTHE.

May 8.

THIS was an action of debt, to recover from the defendant, as one of the directors of the "Trinidad Great Eastern and South Western Railway Company," the sum of £13, for advertisements inserted in the "Sunday Times" newspaper. The defendant pleaded in abatement the non-joinder of several co-contractors. In the affidavit of verification, the residence of one of them, Sir George Rich, was stated to be "43, Lowndes-street, Belgrave-square."

*Lush*, for the plaintiff, had obtained a rule to shew cause why the plea should not be set aside, on an affidavit stating, that, at the time of the commencement of the suit, Sir George Rich was not living at 43, Lowndes-street, but had some time before left it and gone abroad; and that the house, No. 43, Lowndes-street, was the property of Colonel Austin, and then in the care of a person who was endeavouring to let it.

Affidavits were filed in answer, from which it appeared that the house and furniture were the property of Sir George Rich, who was in fact residing there at the time of the commencement of the suit, but had since gone abroad for the benefit of his health, and was endeavouring to let the house furnished for a few months, until his return, and that Col. Austin was occupying it merely as the friend and guest of Sir George Rich. On the 6th of May,

*Jervis* shewed cause against the rule, and contended, that the affidavit stated with "convenient certainty," within the meaning of the 3 & 4 Will. 4, c. 42, s. 8, the residence of Sir George Rich, and that no other place of residence could, under the circumstances, properly be given.

*Lush*, contra, insisted that the affidavit ought to indicate

In an affidavit of verification of a plea in abatement of the non-joinder of A. as a defendant, his residence was declared to be "43, Lowndes-street, Belgrave-square." It appeared that he was residing there at the time of the commencement of the suit, but had since gone abroad; that the house and furniture were his; that he was endeavouring to let the house furnished for a few months, until his return from abroad; and that B. was occupying it as his friend and guest:—*Held*, that this was a sufficient description of A.'s residence, within the stat. 3 & 4 Will. 4, c. 42, s. 8.

The "residence" mentioned in that statute means the domicile or home of the party.



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some place where the party might be found by the plaintiff to ascertain the truth of the plea; and that here it did not clearly appear that Sir George Rich had any intention of returning to this house as a place of residence.

The Court took time to look into the affidavits, and now

POLLOCK, C. B., said:—We are all of opinion that the residence here stated was the true residence of Sir George Rich, within the meaning of the statute, which requires it to be stated on affidavit to verify a plea in abatement. Although he was not living there at the time, the house and furniture were his; and, under the circumstances, the statute has been sufficiently complied with. The residence mentioned in the statute must be read in the sense of a man's *home*. The rule will therefore be discharged, but without costs.

PARKE, B.—It means *domicile* or *home*; and this house certainly appears to have been Sir George Rich's home.

PLATT, B.—I was at first led, by the language of the act of Parliament, to a contrary opinion; but, on looking at the cases which were decided before the passing of that act, namely, *Newton v. Verbecke* (a), and *Taylor v. Harrison* (b), I agree with the rest of the Court. The statute intended to enjoin that to be done, which the Courts before directed to be done.

Rule discharged.

(a) 1 Y. & J. 257.

(b) 4 B. & Ald. 93.

1846.

## O'BRIEN v. CLEMENT.

May 8.

**THIS** was an action for an alleged libel, published in the "Bell's Life in London" newspaper. The defendant had obtained a judge's order for pleading several matters; viz. first, not guilty; secondly, a justification as to a part of the libel; and thirdly, a special plea of an apology, and payment of money into court, under the stat. 6 & 7 Vict. c. 96, s. 2 (a).

In an action for a libel published in a newspaper, the special plea of apology and payment into Court, given by the stat. 6 & 7 Vict. c. 96, s. 2, cannot be pleaded along with not guilty to the same part of the declaration.

*Lush* having obtained a rule to shew cause why the order and rule of Court drawn up thereon should not be amended, on the ground that the special plea given by the statute ought not to be allowed to be pleaded to a cause of action which was covered by the general issue—

(a) Which enacts, "that, in an action for libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication, without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication, a full apology for such libel; or, if the newspaper or periodical publication in which the said libel appeared, should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication, to be selected by the plaintiff in such action;—that every such defendant shall, upon filing such plea, be at liberty to

pay into court a sum of money, by way of amends, for the injury sustained by the publication of such libel; and such payment into court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to the payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court under an act of the 3 & 4 Will. 4, intituled 'An act for the further amendment of the law and the better advancement of justice;' and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea."

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*Jervis* and *C. Clark* now shewed cause.—These pleas are not inconsistent. This statute gives to defendants in libel a form of special plea before unknown. It consists of several parts; first, the statement that the libel was inserted in the paper without actual malice or gross negligence; secondly, that the defendant afterwards published a full apology; thirdly, the payment into court of amends: and the general effect of the defence is, to shew that the libel complained of was not published maliciously,—which is the essence of the action. The payment into court under the stat. 3 & 4 Will. 4, c. 42, s. 21, and the rule of Trin. T. 1 Vict. is of a very different nature. In all the cases there provided for, the right of action is complete on proof of some act done; but in cases of libel the jury have also to consider whether the act done—the publication of the libellous matter—was *malicious*, and are to be satisfied of a bad intention on behalf of the defendant. This plea of payment into Court, therefore, as it does not admit a malicious publication, may stand with the general issue. Tender of amends to a justice or other officer is pleadable together with not guilty.

*Lush*, *contra*, was stopped by the Court.

PARKE, B.—It seems to me that we ought not to allow this special plea together with the general issue; for if we were, and the verdict for the general issue should be for the defendant, there would be a difficulty as to the judgment. What would become of the damages paid into Court? because the special plea would shew on the record a cause of action in respect of which the plaintiff ought to recover them. In *assumpsit*, you cannot plead *non-assumpsit* and a plea of tender together. It is true, that in an action against a justice of the peace, he may plead not guilty and also a tender of amends; but the reason is, that there the tender does not admit a debt. If the plaintiff refuses the sum tendered as amends, he has no remedy for it after-

wards; so that there the pleas are not inconsistent. The plea of tender of amends is not in denial of the cause of action, but shews an act done before action which bars the remedy. The plaintiff must elect whether he will accept the amends offered, and if he refuses, it is his own fault if he is barred. The only respect in which payment of money into court under this statute differs from a payment into court in cases under the new rules, is that those rules give a *general* plea, applicable to all cases except such as are therein specified; whereas this statute makes that general form insufficient, in cases to which the statute applies; and if you pay money into court under it, you must bring your case within the description of libel to which it refers. The intention plainly was to extend to certain actions of libel the benefit of the plea of payment of money into court, as it existed in other forms of action. I ought to observe, however, that Mr. *Clark* is mistaken in saying, that no action for libel can be maintained without proof of a malicious intention. Everything printed or written, which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been; and under the general issue the defendant may deny the publication of the alleged libel, or shew that it was not of an injurious nature, or shew that it was published on some lawful occasion.

The rule will therefore be absolute to amend the order and rule of Court, by confining the general issue to such part of the declaration as the plea of payment into court does not apply to.

ROLFE, B., and PLATT, B., concurred.

Rule absolute accordingly.

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## CUMMING v. BEDBOROUGH (a).

Where a tenant pays property tax assessed on the premises, and omits to deduct it in his next payment of rent, he cannot afterwards recover the amount as money paid to the use of the landlord.

**ASSUMPSIT.** The first count of the declaration was framed upon a special agreement, whereby the defendant, as it was alleged, in consideration that the plaintiff would surrender to him a term of years in a portion of certain premises which he held as tenant to the defendant, and would assign to him the furniture and effects in that part of the demised premises, of the value of £300, the defendant agreed to withdraw a distress for rent, and to pay over to the plaintiff the balance of the £300, after satisfaction of the rent, and of the taxes due in respect of the premises; and the breach was for non-payment to the plaintiff of such balance, amounting to £90. There were also counts for money had and received, for money paid, and on an account stated.

The defendant pleaded non-assumpsit, and a set-off for use and occupation, &c.

At the trial, before Lord *Denman*, C. J., at the summer assizes for Berkshire, 1845, it appeared that the plaintiff was tenant to the defendant of three houses, Nos. 5, 6, and 7, Clarence Crescent, Windsor. In January, 1845, an execution was put into the house No. 6, at the suit of one Millard. The defendant thereupon claimed from the sheriff an arrear of rent which was due to him, amounting to £140. After some discussion, a compromise was come to, whereby it was agreed that Millard should take to the furniture of the house No. 6, valued at about £300, in satisfaction of his debt, and should pay the defendant £100 in satisfaction of his rent; and that Millard should become the tenant of the house to the defendant, instead of the plaintiff. On the following day, January 15th, the defendant, hearing that another execution was about to be put into the house No. 7, distrained on Nos. 5 and 7, for £185 rent, due at Christ-

(a) Decided in Hilary Vacation (Feb. 7).

mas, 1844; and a written agreement was thereupon entered into between the plaintiff and the defendant, the purport of which was, that the furniture in No. 7 should be taken to by the defendant, at the estimated value of £295, from which the amount of the rent, and a further sum of £20 (in consideration of the defendant's taking to the house No. 7, without notice), were to be deducted, leaving a balance of £90, which the defendant was to retain as security for the payment of the rent thereafter to become due for No. 5, and of any *rates and taxes then due* in respect of any of the three houses. The Lord Chief Justice ruled, that the agreement alleged in the first count of the declaration was not proved by this evidence; it was contended, however, that the plaintiff was entitled, on the count for money paid, to a verdict for the sum of 6*l.* 14*s.* 4½*d.*, which was the amount of several payments made by the plaintiff for property tax, in respect of the three houses, for the period between October, 1842, and April, 1844, which he had not deducted out of any subsequent payments of rent, and for which no provision had been made in the agreement. The defendant's counsel contended, that the payment of these sums was to be considered, under the circumstances, as voluntary on the part of the plaintiff, and that they could not be recovered back in this action: and *Denby v. Moore* (a) was cited. The Lord Chief Justice was of that opinion, and directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for him for 6*l.* 14*s.* 4½*d.*

In last Michaelmas Term, *Whateley* obtained a rule nisi accordingly, against which

*F. V. Lee* and *Bramwell* now shewed cause.—There is no foundation for the argument, that the plaintiff was entitled to recover back this sum as money paid to the use of the defendant. The Property Tax Act, 5 & 6 Vict. c. 35, s. 60, Schedule (A.), No. 4, Rule 9, (which is in the same

(a) 1 B. & Ald. 123.

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terms as the 46 Geo. 3, c. 65,) enacts, that "the occupier of any lands, &c., being tenant of the same, and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord for the time being, as a rate of 7*d.* for every 20*s.* thereof would, by a just proportion, amount unto, which deduction shall be made out of the first payment thereafter to be made on account of rent . . . . . and the tenant paying the said assessment shall be acquitted and discharged of so much money, as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable." The tenant, therefore, is not entitled to make the deduction until the rent becomes due and is paid *thereafter*. If, then, this settlement between the parties amounted to a payment of rent, the plaintiff should then have deducted the amount of these assessments: *Denby v. Moore*; if it did not, then the time for making the deduction has not yet arrived. [*Pollock*, C. B.—The property tax is assessed upon the *land*; the landlord, being out of possession, is not personally liable; if the tenant fails to pay the tax, there are no means of getting it from the landlord. *Alderson*, B.—In *Denby v. Moore*, *Abbott*, J., and *Holroyd*, J., consider the payment of the tax by the tenant as payment of so much of the next rent due by him to the landlord; if so, the payment afterwards of the full rent might entitle him to receive back the surplus as money had and received; but here, upon the agreement, it does not appear that the landlord has been overpaid; we do not know whether *he* did not actually pay the property tax. *Platt*, B.—Besides, the payment to the tax collector does not relieve the landlord from any payment; how then is it money paid to his use? *Parke*, B.—There is no implied request by the landlord to the tenant to pay it.] No; the payment is not in discharge of any obligation of the landlord. Suppose A. let a house to B., and B. sublet it to C., C. to D., and D. to E., at rack rents; E. is forced to pay the property tax; D. is not liable at all

for it, yet *he* is to allow it in the first instance:—surely it could not be money paid to his use, when eventually it would never come out of his pocket. The landlord cannot refuse to deduct it from the next rent; he would be a wrong-doer thereby, just as much as if he were to receive the whole rent when part had been paid. Indeed, the 103rd section of the act imposes, for such refusal, a penalty of £50. This case cannot be decided in favour of the plaintiff without overruling *Denby v. Moore*; for when the Court there decided that payment of this tax by the tenant was part payment of the rent, they in effect decided that it was not money paid to the use of the landlord. So, where the tenant had paid the property tax, it was held that he had a right, in an action brought against him for use and occupation, to deduct it at the trial: *Baker v. Davis* (a). [*Parke, B.—Franklin v. Carter* (b) also shews, that, in covenant for rent, the defendant may plead the payment of property tax in bar of so much of the demand.]

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But, further, it does not appear, in point of fact, that the landlord has received the amount of these assessments. Suppose the rates and taxes due, at the time of the agreement, amounted to £90 and more, then the defendant would not receive any of the current quarter's rent. [*Parke, B.—You say, non constat that the £90 would pay the accruing rent, plus the rates and taxes then due, plus the property tax paid.*] Yes; that is left entirely in doubt upon the facts of the case.

*Whateley and Voules, contra.*—If the action of money paid will not lie for the tenant who pays the property tax under such circumstances, how is he to get back the money? [*Parke, B.—It does not follow, that, if money paid will not lie, there is no other remedy.*] It is a fallacy to suppose that it is a payment of *rent*; it is payment of a tax which is

(a) 3 Campb. 474.

(b) 1 C. B. 750.



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payable in the first instance by the occupier, and repayable to him by the landlord. The ground of decision in *Denby v. Moore* was, that the payment of the whole rent, at the time when it was in the tenant's power to have deducted the amount of the tax, was a *voluntary* payment by him, and therefore the amount of the tax could not be recovered back by him in an action for *money had and received*. But, in *Graham v. Tate* (a), where the tenant of premises under a lease agreed to pay all taxes, except the property tax, which the landlord agreed to allow, but afterwards distrained and sold for the whole rent, without making such allowance, knowing that the tenant had paid the tax to the collector, it was held that the tenant might recover the amount from the landlord in an action for money had and received. [Alderson, B.—To make the cases parallel, you should shew that the plaintiff here has paid the whole rent.] He has done so. When the agreement was come to no rent was due; the rent previously payable had been satisfied by the distress. In *Spragg v. Hammond* (b), where, on a distress being made for the whole rent, a deduction for land tax was *refused*, and protested against by the tenant, who, nevertheless, continued to pay the tax for five years afterwards, without renewing the objection as to the non-liability, this was rightly held to be a voluntary payment. *Andrew v. Hancock* (c) is to the same effect. But here the payment was not voluntary on the part of the plaintiff; it was made under a mistake of facts, and at a time when no rent was due from him.

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. [His lordship stated the facts of the case, and continued:] The special agreement alleged in the declaration was not proved by the evidence, and the Lord

(a) 1 M. & Selw. 609.

(b) 2 Brod. & B. 59.

(c) 1 Brod. & B. 37.

Chief Justice, being of opinion that the amount of the property tax paid by the plaintiff could not be recovered back in this action, directed a verdict for the defendant on all the issues, subject to a motion to enter a verdict for the plaintiff for 6*l.* 14*s.* 4½*d.*, the amount of the property tax, on the count for money paid. I abstain from giving any opinion in this case, whether money paid, or money had and received would lie to recover back the amount of the tax, if not deducted, as it ought to be, out of the next rent; because, in this case, the plaintiff's remedy, if any, was upon the special agreement, and that only; if he has no remedy under it, he has none at all. By that agreement, the rights of the respective parties, arising upon the whole transaction, were regulated; and the plaintiff having agreed that the defendant should retain the £90 as a security for the accruing rent, and for the rates and taxes then due in respect of the premises, he cannot claim to recover back any part of it until they are satisfied.

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PARKE, B.—I think this is a very clear case. In the first place, I am of opinion that the tenant, after he has paid the property tax, and omitted to deduct from the next rent, cannot sue the landlord for the amount. He is not in the situation of having paid money to the use of the landlord, but in that of a tenant who has paid rent in advance. The transaction between these parties in January, 1845, was in the nature of a compromise, and thereby all demands were settled up to that time; and the plaintiff did not then claim to be entitled to deduct the property tax. Not having done so, he cannot recover it back, either as money paid, or money had and received.

ALDERSON, B.—If an action for money paid will not lie in this case, the plaintiff is out of court. Money had and received would not lie, because it is not shewn that the

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rent was overpaid at all. It either is a voluntary payment, or it is no payment at all.

PLATT, B.—This tax is assessed upon the occupier; he is bound to pay it; and the tenant's remedy is to recompense himself out of the next rent. The money paid by him for the tax is paid in part satisfaction of the rent; and how can money paid in part satisfaction of the rent, be paid to the use of the landlord? Again, how can it be money had and received to the use of the plaintiff? Where a tenant has voluntarily paid the whole rent, and afterwards pays a landlord's tax, even then he cannot have an action for money had and received.

Rule discharged.

April 28.

RODGERS & Another v. MAW.

Where the amount proved under a plea of set off, pleaded to the whole declaration, does not cover the plaintiff's demand in the action, the defendant cannot have a verdict on the plea for the amount proved, but it will go in reduction of damages.

The plaintiff and the defendant were partners. They

dissolved the partnership, the plaintiff agreeing to take all the debts of the firm upon himself, and to release the defendant from liability, and the defendant giving him a bond for a certain sum payable by instalments. The plaintiff failed to pay a debt due from the firm, whereupon the creditors sued the defendant, and obtained judgment, and issued a fi. fa., under which the sheriffs seized and sold the defendant's goods, and out of the proceeds paid the debt.

*Semble*, that, in an action on the bond, the defendant was entitled to set off, as money paid, the sum so paid by the sheriff.

DEBT on bond, in a penalty of £4000, conditioned for the payment of £2000 by instalments. Pleas, non est factum, and a set-off; on which issues were joined. The cause was tried before *Rolfe*, B., at the Spring Assizes at Liverpool, 1844, when a verdict was taken for the plaintiffs, damages £1725, subject to a motion to reduce the damages. A rule was accordingly obtained for that purpose, and the case was argued in Easter Term, 1844, by *Martin* and *Crompton* for the plaintiff, and by *Knowles* and *Cowling* for the defendant. The facts and arguments sufficiently appear from the following judgment, which was now delivered by

POLLOCK, C. B.—This was an action on a bond, with a penalty of £4000, conditioned for the payment of £2000 by different instalments. At the trial before my Brother *Rolfe*, at the Liverpool Spring Assizes, 1844, it appeared that the defendant pleaded a set-off, on which issue was joined. The periods of payment had all elapsed, and £1725 remained due, which was claimed in the action.

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The defendant's set-off arose under these circumstances: The two plaintiffs and the defendant had been partners. They agreed to dissolve the partnership in 1840; the two plaintiffs agreed to take all the debts on themselves, and to release the defendant from all liability as to the joint concern; and this was the consideration for the bond upon which the action was brought. We have no doubt that this amounted to a covenant to pay the debts, and that, as between the plaintiffs and the defendant, the defendant became surety only. The plaintiffs, however, did not pay all the debts; but the defendant was sued, with them, by the holder of a bill for £1730, dated in September, 1839, drawn by one of the plaintiffs of the firm. Before this action was brought, the defendant had paid to the holder of the note three sums of £500, £500, and £60, amounting to £1060; and a sum of £448 had been paid by the sheriff, under an execution against the defendant's goods, in an action at the suit of the holder of the note. At the trial, a verdict was taken for the sum claimed in the action, viz. £1725, and leave was reserved to the defendant to move to reduce that amount to 216*l.* 6*s.* 1*d.*, or such sum as the Court should, under the circumstances, direct. Mr. *Knowles* accordingly obtained a rule to shew cause in Easter Term, 1844, which was argued before my Brothers *Gurney* and *Rolfe*, and myself, in the same Term.

Two points were made on behalf of the plaintiffs. First, that, as the set-off proved did not cover the plaintiffs' demand, the plea was disproved, and could not avail in reduction of damages; 2ndly, that, as part of the set-off

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consisted of money levied under an execution against the defendant's goods, and not paid by the defendant directly in money, it could not be made the subject of set-off as money paid: and the case of *Moore v. Pyrke* (a) was cited as an authority on that point.

With respect to the first point, there is no set-off at common law; it is merely under the statutes of set-off; and the question turns upon the construction which those statutes have received, or ought to receive. The first statute is the 2 Geo. 2, c. 22, s. 13, amended and made perpetual by the 8 Geo. 2, c. 24, ss. 4 & 5. The expression in the last act, that "in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other, &c.," imports that a set-off, if pleaded and proved, shall prevail in reducing the amount, though it may not wholly cover the plaintiffs' demand. In *Collins v. Collins* (b), Lord Mansfield, on the argument, threw out that a set-off under the 8 Geo. 2, must have the same effect as payment under 8 & 9 Will. 3, c. 11; and when, after deliberation, the Court gave judgment, it was expressly held that a set-off was equivalent to actual payment, and that a balance must be struck, as in equity and justice it ought. We believe this exposition of the statute has been acted upon ever since in Westminster Hall, and has not been doubted, unless the mistaken report of the case of *Tuck v. Tuck*, in 7 Dowl. P. C. 373, more correctly reported in 5 M. & W. 109, is an exception. It is contended for the plaintiff, that if the plea of set off, pleaded to the whole, does not in proof cover the whole, it will avail nothing, and not only the defendant cannot have a verdict to the extent of the set-off proved, (which is undoubtedly correct,) but the set-off, though proved, cannot operate in reduction of damages. We

(a) 11 East, 52.

(b) 2 Burr. 820.

think this cannot be supported upon authority or on principle. The case of *Tuck v. Tuck* (a), cited for the plaintiff from 7 Dowl. 873, shews that the defendant cannot have a verdict on the plea of set-off, unless the plea covers the plaintiff's demand, either as it stood originally, or as reduced by some other plea; but it is no authority for depriving the defendant of the benefit of the set-off in reduction of damages; for, according to the report in Meeson & Welsby, (stated by the counsel in the case to be a correct report,) this benefit was expressly allowed. In *Cousins v. Padon* (b), it was held that the plea of set-off was not now to be construed strictly: and in *Moore v. Butlin* (c), it was held that a plea of set-off was not divisible; and that, if it failed to cover the demand, the plaintiff was entitled to a verdict on the whole plea. But there is nothing in that case, or in any of the cases, to shew that the defendant might not have the benefit in reduction of the damages, although the plea was found against him; and, in giving the judgment of the Court in that case, Lord Denman says, "though the plea is no bar to the action, the residue might reduce the damages." In *Tuck v. Tuck*, the set-off was allowed at the trial to reduce the damages, though the Court would not enter a verdict for the amount proved; and in *Baines v. Butcher* (d), the same course was adopted. We are therefore clearly of opinion, that, as to the sums actually paid, the set-off must avail in reducing the damages.

With respect to the other point, it is certainly decided, in *Moore v. Pyrke*, that where the goods of a party taken as a distress for rent, which ought to have been paid by another, were actually sold, the party injured could not recover as for money paid, though he might have maintained such an action, had he paid the rent in money under the

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(a) 5 M. & W. 109.

(b) 2 C., M. & R. 547.

(c) 7 Ad. & Ell. 595; 2 N. & P. 436.

(d) 9 C. & P. 725.

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pressure of the distress, instead of allowing his goods to be sold: see *Exall v. Partridge* (a). The present case is not precisely the same: here the defendant's goods were taken, not under a distress, but under a writ of *fi. fa.*, which directs the sheriff to make of the defendant's goods in that action "*so much money*:" and the sheriff has so done; he has made money of the defendant's goods, and therewith has paid the claim in the action. The redress for money paid is much more simple and beneficial than a special action upon the case; of which this is an instance. Here the plaintiffs are suing on the consideration for their promise to indemnify, and the defendant, it is contended, cannot set off the money paid by the produce of his goods in consequence of the breach of that promise. We cannot see upon what principle a man may not set off money paid by the produce of his goods, as well as money paid indirectly, without any sale of his goods. If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser, and turned into money, he may maintain trespass for the forcible injury; or, waiving the force, he may maintain trover for the wrong; or, waiving the tort altogether, he may sue for money had and received. In this case, the surplus of the sale, after paying the debt, would clearly belong to the party, and he might sue the sheriff as for money had and received; and if with the residue the sheriff has paid a debt that the plaintiffs were bound to pay, we think it is at least doubtful whether it be not more in the spirit of the law that a set-off should be allowed in such a case, than that a party should be driven to a special action. In *Merryweather v. Nixan* (b), an action had been brought against two defendants for a tort, and the damages recovered were levied, as the report states, wholly on the plaintiff, and he sued as for money paid. It was decided that no contribution could be claimed as between wrong-

(a) 8 T. R. 308.

(b) *Id.* 186.

doers; but neither at the trial, nor on the motion, was it suggested that the action would not lie, because the money was *levied*, and *not paid*, if that was the fact, as may be collected, though not with certainty, from the report. Lord *Kenyon*, in that case, said there was a clear distinction between tort and assumpsit; and intimated that the action might have been maintained, if the action had been one of contract, and not tort: and it may be observed, that this case was not cited at the bar, or noticed by the Court, in *Moore v. Pyrke*. With respect to the necessity of actual payment of money, it may be remarked, that although, in *Maxwell v. Jameson* (a), it was held that giving a bond to pay is not equivalent to payment, yet in *Barclay v. Gooch* (b), Lord *Kenyon* decides, that, if a surety satisfied and extinguished the debt of the principal by giving a note which was accepted as payment, he might maintain an action for money paid before the note was due. Upon the whole, we think there is so much doubt in applying the case of *Moore v. Pyrke* to the present case, or in the principle of that decision, that we think an opportunity ought to be given to the defendant (if he desires it) to put this upon the record by special verdict or bill of exceptions, which can easily be done by arrangement between the parties.

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The case stood over for this purpose, but it was afterwards compromised.

(a) 2 B. & Ald. 51.

(b) 2 Esp. 571.



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April 29.

DOE *d.* HAW *v.* EARLES and Another.

Devise as follows:—"I dispose of *all my effects* as follows: All my household goods, live stock, furniture, plate, wearing apparel, and *other effects* at this time in my possession, or that may hereafter become my *property*, unto my wife J. H. I bequeath to J. P. £200, to be paid to her at the death of my wife. But if my wife after my decease see fit to marry, her second husband shall have no claim whatsoever, that is, to sell or dispose of any part of the property now or hereafter may be in my possession; but the above sum of £200 shall be paid to J. P. at the time of my wife's marriage."

*Held*, by Pollock, C. B., and Platt, B., *Parke*, B., dissentiente, that a remainder in fee in real estate did not pass by this devise.

IN pursuance of an order of *Platt*, B., made on the 26th May, 1845, by consent, in the above cause, the following case was stated for the opinion of this Court.

John Haw, being seised in fee simple of certain freehold houses, situate in Hoxton, in the county of Middlesex, in remainder expectant upon the decease of Martha Simpson, who survived him, made his will, bearing date the 14th March, 1844, and duly executed, in the following words:—"In the name of God, Amen. I, John Haw, of No. 5, Stapel-street, in the parish of St. Mary Magdalen, Bermondsey, in the borough of Southwark, in the county of Surrey, being of sound mind, do hereby make, publish, and declare this to be my last will and testament, and do dispose of *all my effects* as follows:—All my household goods, live stock, furniture, plate, wearing apparel, and *other effects* at this time in my possession, or that hereafter become my *property*, unto my dearly beloved wife, Jane Haw. I do further bequeath to Jane Parker the sum of £200, to be paid to her at the death of my wife. But if my beloved wife, after my decease, see good to marry, her second husband shall have no claim whatsoever, that is, *to sell or dispose of any part of the property, now or may be hereafter in my possession*. But the above sum of £200 shall be paid to Jane Parker at the time of my wife's marriage. And I do declare this to be my last will and testament. And I do appoint my dearly beloved wife, Jane Haw, to be my sole executrix hereto."

The testator had not, at the time of making his will, or at the time of his death, any estates or real property of which he was to come into possession at a future period, except the houses of which he was seised in fee in remainder, as before stated. The lessor of the plaintiff is the widow of the testator, John Haw. The defendants, one of whom is the

heir-at-law of John Haw, are in possession of the houses in question.

If the Court shall be of opinion that the testator's estate in remainder in the houses in question passed by the will of John Haw, the judgment is to be in favour of the lessor of the plaintiff. If the reverse, the judgment to be in favour of the defendants.

The question for the opinion of the Court is, whether or not the testator's estate in remainder in those houses passed by the will of John Haw to his widow.

The case was argued in last Hilary Term (Jan. 21) by

*Watson*, for the plaintiff.—The real estate in remainder passed by this devise to the widow of the testator. There are many cases to shew that the word “effects” may be construed to pass real property; and here it is obvious on the whole of the will, that the testator did not intend to die intestate as to any part of his property. He begins by stating his intention to dispose of “all his effects;” and when he afterwards uses the word “property,” that is grammatically referable to the last preceding words, “other effects,” and is to be taken as being used in the sense which is legally attributable to it. It means, in substance, “whatever property I have, or may hereafter have, I give to my wife.” The subsequent proviso, in case of the re-marriage of the wife, confirms this view; for there, referring to the same property which he had previously given to his wife, he says that the second husband shall have no claim “to sell or dispose of any part of the property” that then was, or thereafter should be, in his possession. The intention, therefore, is manifest upon the whole will; and that being so, the word “effects” will, in conformity with the authorities, be held to pass the real estate.—He cited *Marquis of Titchfield v. Horncastle* (a), *Jackson v. Hogan* (b), *Doe d.*

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(a) 2 Jurist, 610.

(b) Cowp. 299; 3 Bro. P. C. 389.

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*Chilcott v. White* (a), *Doe d. Wall v. Langlands* (b), *Doe d. Evans v. Evans* (c), *Doe d. Tofield v. Tofield* (d), *Doe d. Morgan v. Morgan* (e), *Doe d. Hick v. Dring* (f), and *Doe d. Andrew v. Lainchbury* (g).

*Jervis*, for the heir-at-law.—The heir is to be disinherited only by clear and unequivocal words. No doubt there are cases which decide that the word “effects” may be strained to carry the real estate, where the intention so appears from all the other parts of the will: but it is equally clear that its *prima facie* meaning is *personalty*. Here the testator, being at the time of making his will the owner of both personal and real estate, disposes of “all his effects,” and then goes on to enumerate the kind of effects he means, namely, his “household goods, live stock, furniture, plate, wearing apparel, and *other effects*,” that is, *ejusdem generis* with those specified. Then he includes in the bequest all effects of the same kind which may hereafter become his *property*—that is, of which he may hereafter become the owner or proprietor. It is an established rule, that in such a case such words as “other effects,” following an enumeration of particular effects, are to be construed to mean effects of the same kind: *Galliers v. Moss* (h). It is not a disposition of his effects generally. Nor does the subsequent part of the will conflict with this construction; the words “property now or hereafter in my possession” mean merely “the things which now are or shall hereafter become mine, of the kind before mentioned.”—He then proceeded to comment upon the authorities cited for the plaintiff, relying strongly on *Doe d. Hick v. Dring*; and cited also *Doe d. Harrell v.*

- (a) 1 East, 33.  
 (b) 14 East, 730.  
 (c) 9 Ad. & E. 719; 1 P. & D.  
 472.  
 (d) 11 East, 246.  
 (e) 6 B. & C. 512; 9 D. & R.

633.  
 (f) 2 M. & Selw. 448.  
 (g) 11 East, 290.  
 (h) 9 B. & Cr. 267; 4 Man. &  
 R. 468.

*Hurrell* (a), *Doe d. Bunny v. Rout* (b), *Wilkinson v. Maryland* (c), *Marquis of Hertford v. Lord Lowther* (d), *Trafford v. Berrige* (e), *Hotham v. Sutton* (f), *Timewell v. Perkins* (g), and *Roe d. Helling v. Yeud* (h).

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*Watson*, in reply (i).—*Doe d. Hurrell v. Hurrell* simply decided that the word “estate” was controlled by its association with “effects on my farm.” In *Doe v. Rout*, words sufficient to pass real estate were expounded by the testator’s other words, used in the last clause of the will. The same is the case here. None of the other cases cited for the defendant have any direct bearing on the present question. In *Galliers v. Moss*, the Court did not apply any strict rule of construction, such as “noscitur a sociis,” as in a deed, but only came to the conclusion, on the whole context of the will, that the testator did not intend to pass mortgaged estates.

Cur. adv. vult.

The learned Judges differed in opinion, and now delivered their judgments seriatim.

PLATT, B.—This action of ejectment was brought by Jane Haw, to recover certain freehold houses at Hoxton, claimed by her as a devisee under the will of John Haw, her deceased husband. The will was in these terms: [His Lordship read it.] At the time of executing this will, and at the time of the death of the testator, he was seised of

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| (a) 5 B. & Ald. 18.                  | other defendant, who was a trustee in possession of the premises, |
| (b) 7 Taunt. 80.                     | and had appeared and pleaded separately by another attorney,      |
| (c) Cro. Car. 147; 1 Rol. Abr. 834.  | and claimed to be also heard;                                     |
| (d) 7 Beav. 1.                       | but the Court ruled that he had no right to be heard, inasmuch    |
| (e) 1 Eq. Cas. Abr. 201.             | as one and the same question                                      |
| (f) 15 Ves. 319.                     | only was raised upon the case by                                  |
| (g) 2 Atk. 102.                      | both the defendants.  |
| (h) 2 N. R. 214.                     |   |
| (i) <i>Whateley</i> appeared for the |   |

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the houses in remainder, expectant on the decease of Martha Simpson; and the question in the cause was, whether his interest therein passed by the will to the widow.

A devise should be more favourably expounded than a deed, to pursue, if possible, the will of the devisor, who, for want of advice or learning, may have omitted the legal or the proper phrases. Thus, a fee may be given without words of inheritance, and an estate tail, without words appropriate to that estate by a will: so, an estate may pass by mere implication, without any express words; as where a man devises lands to his heir-at-law after the death of his wife, she shall have the estate for life by implication, although no estate be given to her in express terms. The instrument is emphatically termed the testator's *will*, and is entitled to receive a favourable interpretation, and as near to his mind and intention as may be consistently with the forms of law. The maxim of law is, "*voluntas ultima testatoris est perimplenda secundum veram interpretationem suam.*" The mind and intent of the testator must be collected from the terms of the instrument itself, as explained, if apparently ambiguous, by the nature and state of his property; and words not only inapplicable to but opposed to the application of real property, have, when explained by other parts, or by the general context of the will, been deemed sufficient to pass this property. Thus, in *Doe d. Tofield v. Tofield*, the words "personal estate," so explained, were deemed to be sufficient for the purpose. The question in this case is, what did the testator intend to dispose of by the description "all my effects;" whether the subject of intended disposition was real or personal. This must be collected from the terms of the whole will, coupled with the nature and state of the property of which the testator had this power to dispose. "*Benignæ faciendæ sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire.*" Had the word "effects" stood alone, and without

the means of explanation, the authorities would forbid its being extended so as to include the real estate; but the context of the whole will, in this particular case, induces me to think that the testator used the word "effects" as synonymous with the word *property*, and that, in using the words "or which hereafter becomes my property," he contemplated a disposition of the remainder in question, treating it as a contingent interest, and not, as one skilled in the law would have done, as a vested interest, expectant on the determination of a particular estate. This view is confirmed by his words in describing the estate, the sale of which by an after-taken husband of his widow he forbids, as "property which thereafter might be in his possession." It seems, therefore, to me, that what the testator meant to be collected from the different clauses of the will, as explained by the nature and state of the property over which he had a disposing power, was to devise and bequeath the whole of that property, and that the will should be read as if the word "property" had been used instead of the word "effects," and the words "or which may be hereafter in my possession," instead of "hereafter to become my property." The will would in that case have been unambiguous altogether, and would have run plainly in these terms:—"I do dispose of all my *property* as follows:—All my household goods, plate, furniture, and other property, at this time in my possession, or which may hereafter be in my possession, unto my dearly beloved wife Jane Haw, &c.; but if my beloved wife, after my decease, think good to marry, her second husband shall have no claim whatever to sell or dispose of any part of the property now or which may be hereafter in my possession." If this is a correct mode of dealing with this will, the judgment of the Court of Queen's Bench in *Doe v. Langlands* (a), and in *Doe d. Morgan v. Morgan* (b), and the judgment of the Vice-Chancellor of England in

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(a) 14 East, 370.

(b) 6 B. &amp; C. 512

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*Parkin v. Knight* (a), are authorities to shew that the remainder in fee would pass by such a devise. I therefore think the judgment should be for the plaintiff.

PARKE, B.—The only question in this case is, whether a remainder in fee in certain houses, of which a testator died seised, passed by his will to his widow. I am of opinion that it did not. The will is as follows: [His Lordship stated it.] The words used in a will are *prima facie* to be understood in their ordinary sense, and there is no doubt that the meaning of the word “effects” is, in common parlance, confined to personal things; and it has been judicially decided to bear that meaning, unless the context shews that the testator used it in a more comprehensive sense. This was held by all the Court of King’s Bench, in the cases of *Camfield v. Gilbert* (b), and of *Doe v. Langlands* (c); and although, according to the report of the case of *The Marquis of Titchfield v. Horncastle* (d), Lord Langdale appears to have thought that the word might originally have been construed to embrace all the effects, real and personal, of a man’s industry, he does not intimate any opinion that the decisions ought not to be abided by.

Assuming, then, that the word “effects” will not pass real estate, unless the context shews that the testator intended that it should, the sole question remains, whether the other parts of this will shew that intention so clearly as to disinherit the heir-at-law, who is entitled to all which the testator does not, by express words or necessary implication, give to another. I think there are no words which sufficiently indicate such an intention.

He disposes of all his effects “*as follows*”—so that what follows is only the disposition of what he terms “effects.” The words—“all my household goods, live stock, furniture,

(a) 10 Jurist, 23.  
 (b) 3 East, 510.

(c) 14 East, 430.  
 (d) 2 Jurist, 610.

plate, wearing apparel, and other *effects*, now in my possession, or that may hereafter become my property, unto my wife Jane Haw," carry the case no further; only such "effects" as are or may be his *property* pass. Then the testator proceeds to add, that if his wife, after his decease, see good to marry, "her second husband shall have no claim to sell or dispose of any part of the *property* now or hereafter in my possession." These words mean only, that whatever property is left to the wife, shall be held by her to her sole and separate use, independent of any future husband. The words may be applied to personal as well as real estate, and carry the case no further. The "property" means only the property before devised, that is, "effects" merely.

I am therefore of opinion that the remainder did not pass, and that our judgment ought to be for the defendant.

POLLOCK, C. B.—The question in this case turns upon the meaning which is to be put upon the word "effects," as appearing in the present will. The strongest case that was cited on the argument, on the meaning of the word "effects" in a will, is the case of *Doe d. Hick v. Dring*, which I apprehend remains untouched by any subsequent decision, and is a case binding on us as an authority. In that case it was decided, that a devise of "all and singular my effects of what nature or kind soever," does not pass the real estate, where it cannot be collected from the other parts of the will that such was the testator's intention. Now, on reading this will, I certainly should not conceive that the testator intended to give his wife the estate of which he was seised in fee simple in remainder expectant on the decease of Martha Simpson. He says, "I dispose of all my effects as follows:"—I think these words mean his personal estate, and not the real as well as the personal estate:—and having thus declared, in the introductory part of the will, that he disposes of all his effects, which I read "personal effects," he says, "All my household goods, live stock, furniture, plate, wearing apparel,

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and other effects at this time in my possession, or that hereafter may become my property, unto my dearly beloved wife, Jane Haw." It seems to me, that, in addition to the will professing in the beginning to deal only with the personal property, there is the additional argument derived from this, that the words "other effects" follow the enumeration of "household goods, live stock, furniture, plate, and wearing apparel;" and therefore, a fortiori, are to be considered as meaning personal property only. He goes on to say, that all these things in his possession, "or that may hereafter become my property," that is, things of that description that he may become entitled to, are to go to his dear wife; and then he bequeaths, at her death, a legacy of £200, or, if she shall marry, to be paid immediately on her marriage. It seems to me, therefore, that the word "effects," although undoubtedly it *may*, if the words to be found in the will, as connected with the state of the property of the testator, warrant that interpretation, be sufficient to pass real property, is in the present instance to be confined to its natural and legal meaning, and that there are no words in the will to extend it beyond that, nor any circumstances to be coupled with the words, to create an opinion that the testator intended to pass any thing beyond his personal property. Even if I were asked to entertain any speculation on that subject, my judgment is clearly that he did not intend to pass anything more than the personal property.

There will therefore be judgment accordingly for the defendant.

Judgment for the defendant.

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## COLLINS v. HOPWOOD.

*April 29.*

**DEBT** for penalties.—The declaration alleged, that heretofore, and within three calendar months next before the commencement of this suit, to wit, on &c., the defendant, then being a seller of and dealer in coals, carrying on his business at a certain wharf, within the distance of twenty-five miles from the General Post Office, in the city of London, to wit, at &c., at the wharf aforesaid, bargained and sold to the plaintiff, at his request, for &c., a certain large quantity of coals, in a quantity exceeding 560lbs. in weight, to wit, &c., to be delivered to the plaintiff as purchaser thereof, in sacks, and not in bulk, and then sent from the said wharf in a certain cart a large quantity of coals, in twenty sacks, as and for the said quantity so bargained and sold as aforesaid, to a certain place, then being the house of the plaintiff, within the city of Westminster, in the said county, to wit, &c., to be delivered at the first-mentioned place to the said plaintiff as the purchaser thereof, and then also sent and caused to be delivered to the said plaintiff, as such purchaser, immediately on the arrival of the said coals at the last-mentioned place, and before the unloading of the same, a certain paper or ticket, purporting to contain a statement of the number of sacks so sent as aforesaid, and of the weight of the coals in each and every of such sacks, according to the exigency of the statute in such case made and provided; and, by the said paper or ticket so delivered as aforesaid, and which said paper or ticket was directed to the said plaintiff, and signed by the said defendant as the seller of the said coals, and by one J. C., as the carman delivering the same, the said plaintiff was required to receive, &c. [setting it out]; and the plaintiff further saith, that he did thereupon require the said J. C., then being such carman delivering the same as aforesaid, then to weigh successively seventeen of the said

The London Coal Act, 1 & 2 Will. 4, c. lxxvi, s. 57, imposes a penalty not exceeding £5 on the seller of coals, for every sack that shall be found deficient, on its being weighed in pursuance of the act.

*Held*, that, where several sacks are sent out to a purchaser at the same time under one contract, one penalty only is incurred in respect of a deficiency in weight, though every sack is so deficient; and therefore, where seventeen sacks were so found deficient, that the penalties were recoverable by action of debt in one of the superior courts, notwithstanding s. 77, which directs that all penalties imposed by the act not exceeding £25, shall be levied and recovered before justices of the peace.

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twenty sacks of coals contained in the said cart, and so sent for delivery as aforesaid, together with the coals therein respectively, and afterwards in like manner to weigh successively the said seventeen sacks without any coals therein, according to the exigency, &c., and that the plaintiff then procured the attendance of an indifferent and credible person, altogether disinterested in the said matter, to wit, &c., to be present at the weighing of such coals; and the plaintiff further saith, that the said several sacks, with the coals therein, were then and there, before the house of the plaintiff, weighed successively by the said J. C. in the presence of the plaintiff and A., of &c., then being such indifferent and credible person as aforesaid, according to the exigency, &c.; and that, upon the weighing of every such sack, it happened, and the fact was, that each and every such sack, together with the coals therein, weighed less than 224lbs., to wit, &c., and that the said several sacks did not nor did any or either of them contain 224lbs. net of coals each respectively, but on the contrary contained, &c., contrary to the form of the statute, &c.; whereby and by force, &c., the defendant, then being such seller as aforesaid in manner aforesaid, forfeited for his said offence the sum of £5 for every such sack of coals so found deficient as aforesaid, then and there amounting in the whole to the sum of £85. Breach, in non-payment of the said sum of £85.

To this declaration there was a general demurrer; and the marginal note stated the point of law to be, that the penalties for which the declaration proceeded are, under the provisions of the statute 1 & 2 Will. 4, c. 76, which imposed these penalties, recoverable only before a justice of the peace, and that an action of debt does not lie.

Joinder in demurrer.

*Scotland*, for the defendant (April 27).—The question in this case turns on the construction of the 57th, 77th, and 85th sections of the local and personal act, 1 & 2 Will. 4,

c. lxxvi. The 57th section imposes the penalties for which the declaration proceeds; and the words used are, that “the seller or sellers of such coals shall, *for every such sack of coals* that shall be found deficient, forfeit and pay any sum *not exceeding* five pounds. By that section, therefore, a discretionary power to mitigate the penalties is clearly given. Then, by the 77th section, it is enacted, that, “all fines, penalties, &c., by this act, or by virtue of the powers and authorities thereof imposed, &c., *not exceeding twenty-five pounds*, shall be sued for within one calendar month after the offence or offences committed, and all such fines, penalties, &c., shall be levied and recovered before any justice or justices of the peace,” &c. In the present case, the amount of the penalties, under the discretionary power given by the 57th section, might not, in the aggregate, exceed the sum of £25; the jurisdiction, therefore, given to magistrates by the 77th section, applies here. Even if the deficiency in the seventeen sacks be looked upon as constituting but *one* offence, still, as the amount of the penalty is made not merely to depend on the number of the sacks, but may be reduced at discretion, the case falls within the magistrate’s jurisdiction. In the case of *Reeve v. Poole* (a), which was an action on a former coal act, repealed by the 1 & 2 Will. 4, c. lxxvi, to recover penalties for selling one description of coals for another, the distinction between the case where a discretion as to the penalties is given, and where no such discretion exists, is pointed out. There, *Abbott*, C. J., referring to two sections of the act, the one giving by way of penalty “any sum not exceeding 40s.,” and the other directing that “all penalties, not exceeding £20,” should be sued for before a magistrate, says, that “where a statute gives a discretionary power of mitigating penalties, it is a general rule that there the legislature must be taken to have intended to place the matter under the jurisdiction of the justices of the

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(a) 4 B. & C. 155.

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peace.” And *Cates v. Knight* (a) is a clear authority to shew, that where power is given to justices to hear and determine an offence for which a certain penalty is imposed by statute, the superior courts are thereby ousted of their jurisdiction, and that such clauses are introduced for the benefit of the prosecuted. Then, by the 85th section, the case is made still clearer, because thereby the jurisdiction of this Court is expressly limited to the recovery of penalties “where they shall exceed the sum of £25 by this act imposed, for any offence or offences committed against this act.” The effect of a different construction from that now contended for would be, to make the jurisdiction of this Court uncertain; if the jury are to assess the amount of the penalty, and they should find less than the sum of £25 on the whole, the proceedings would then appear under the act to be without jurisdiction. On the other hand, if this construction be upheld, the 85th section will not thereby be rendered inoperative; for there are sections of the act, namely, the 36th, 45th, 55th, 73rd, and 75th, which impose fixed and certain penalties, with respect to which the jurisdiction can at once be ascertained. The words “or by virtue of the powers and authorities thereof imposed,” found in the 77th section, and omitted in the 85th, afford an additional argument to shew, that the intention of the legislature was to make the jurisdiction of magistrates applicable to all cases where the penalties are not fixed in amount by the act, and thus clearly appearing to exceed £25.

*Prideaux*, for the plaintiff, was not heard, the Court saying that, if necessary, they would call upon him before they delivered judgment.

Cur. adv. vult.

The Court now gave judgment.

(a) 3 T. R. 442.

POLLOCK, C. B.—This is an action brought for the recovery of penalties under the 57th section of the stat. 1 & 2 Will. 4, c. lxxvi. That section, after making provision for the providing of a constable, or other indifferent person, to be present at the weighing of coals delivered in sacks, on behalf of the purchaser, enacts, that “in case, upon the weighing of any such sack, it shall happen that any sack or sacks shall not contain either 112 lbs. or 224 lbs. net of coals, as the case may be, then and in every such case the seller or sellers of such coals shall, for every such sack of coals that shall be so found deficient, forfeit and pay any sum not exceeding five pounds.” In this case, the declaration charges that the defendant, the seller of the coals, delivered to the purchaser seventeen sacks of coals, each of which was found deficient in weight, and in respect of which deficiency the plaintiff claims penalties to the amount of £85. I think the true construction of the act is, that one offence, and not seventeen distinct offences, was thereby committed, and one penalty of £85, not seventeen penalties of £5 each, was incurred. Not only does that appear to me to be the reasonable construction of the statute, but the case of *Reeve v. Poole* is a direct authority in support of it. That was an action to recover penalties under the 47 Geo. 3, c. 68, s. 33, which enacted, that if any vendor of coals should knowingly sell one sort of coals for and as a sort which they really were not, within the limits therein mentioned, he should forfeit for every such offence £20 per chaldron for every chaldron so sold. Another clause provided, that all penalties not exceeding £20 should be levied before a justice of the peace. The Court of Queen’s Bench held, that, as the amount of the penalties depended upon the number of chaldrons sold, and the plaintiff had brought his action to recover twenty-five penalties of £20, it was a matter not within the jurisdiction of the magistrate, and the action was properly brought in that court. It is said, however, that, inasmuch as the penalty imposed in this case

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is a penalty, in respect of each sack, *not exceeding* £5, if by any means the whole amount of penalties be reduced below £25, it would then appear that the Court was without jurisdiction. But those words, and the words “not exceeding £25,” in the 77th section, appear to me to be used in the same sense; that is, a penalty or penalties the whole amount of which does not exceed that sum. I think, therefore, that the action is properly brought in this court, and that the plaintiff is entitled to our judgment.

PARKE, B.—I am entirely of the same opinion, and think it is perfectly clear that this penalty cannot be sued for before a magistrate. He has no power to impose this penalty of £85, but only a penalty not exceeding £25. The wording of the 85th section is not quite accurate, but it is clear, it was intended to include all the cases not included in the 77th section. The legislature meant that there should be the security of an action by a common informer, in all cases where the aggregate amount of the penalties alleged to have been incurred exceeded £25. The word “recovered,” in the 85th section, must therefore be read “sued for.”

ROLFE, B.—I am of the same opinion. I think that in this case there were not seventeen penalties incurred, but one penalty of seventeen times £5.

PLATT, B., concurred.

Judgment for the plaintiff.

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May 8.

DOE *d.* LLOYD and Another *v.* INGLEBY.

**T**HIS action of ejectment was tried at the Summer Assizes for Flintshire, 1845, before *Parke*, B., when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:—

By indenture of lease, dated the 28th of April, 1834, the lessors of the plaintiff demised to Mr. Thomas Evans, his executors, administrators, and assigns, a messuage or dwelling-house, and other premises, in the town of Mold, in the county of Flint, for the term of forty years from the date thereof, at the yearly rent of £55, subject to a proviso that if the lessee should assign the lease for all or any part of the term, without the consent in writing of the lessors; or “in case he, the said Thomas Evans, should at any time or times thereafter during the said term commit any act or acts of bankruptcy, whereupon a commission or fiat in bankruptcy should or might be issued against him, and under which he the said Thomas Evans should be duly found and declared a bankrupt,” the term should determine and be void, and thenceforth it should be lawful for the lessees to re-enter.

In December, 1838, Evans underlet a portion of the premises to the defendant for twenty-one years, with the consent in writing of the lessors. On the 5th of December, 1839, Evans, being then a trader, carrying on his business at Mold aforesaid, committed an act of bankruptcy, by executing a general assignment for the benefit of his creditors. A fiat in bankruptcy issued thereon against him on the 24th of January, 1840, and on the 6th of February he was found and declared a bankrupt. All the proceedings under the bankruptcy were regular in form. The petitioning creditors were Messrs. Henderson & Cox, partners, whose debt amounted to £93, and Messrs. Thomas Rees & Thomas Richard Guppy, partners, whose alleged debt amounted to 99*l.* 18*s.*, for goods sold by them to Evans: but it was

A lease for years contained a proviso for re-entry, in case the lessee “should at any time during the term commit any act of bankruptcy, whereupon a commission or fiat in bankruptcy should issue against him, and under which he should be duly found and declared a bankrupt.” The lessee, being a trader, committed an act of bankruptcy, on which a fiat issued against him, and he was by the commissioners found and declared a bankrupt; but the petitioning creditor’s debt on which the fiat was founded was proved by A. & B., as partners, whereas it was due to A., B., & C., as partners.

*Held*, by *Pollock*, C. B., and *Platt*, B., *Parke*, B., dissentiente, that the lessee was not *duly* found and declared a bankrupt, within the meaning of the proviso.



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proved at the trial, that of this sum of 99*l.* 18*s.*, 28*l.* 10*s.* only was due from Evans to Messrs. Rees & Guppy, for goods supplied by them to him before one William Henry Castles became a partner of Rees & Guppy, and that the remaining 71*l.* 8*s.*, the other part of the said sum of 99*l.* 18*s.*, was due from Evans, for goods supplied to him after Castles had so become, and during the time he continued, a partner of Rees & Guppy. Messrs. Rees & Guppy, before and after Castles joined them, carried on business both at Bristol and Liverpool. Castles resided at Bristol. The goods were supplied to Evans from Liverpool. The style of the firm, both before and after Castles joined, was "Rees, Guppy, & Company," and Castles' name was never used. In January, 1840, a negotiation for the dissolution of the partnership commenced between Rees, Guppy, & Castles, which was finally concluded in February, 1840, when Castles retired from the firm, and upon his retirement it was agreed and arranged between all the said parties, that Rees and Guppy, who continued to carry on the business in co-partnership, should be entitled to all the debts due to the said firm; and Castles, in point of fact, never participated in any of the profits or losses of the said partnership, having on his retirement therefrom received back the money he had brought into it.

The question for the opinion of the Court is, whether, under these circumstances, Evans, the lessee, was "duly found and declared a bankrupt," within the meaning of the proviso for re-entry. If the Court shall be of opinion that he was, the verdict is to stand; if of a contrary opinion, the verdict is to be entered for the defendant.

The case was argued in last Hilary Term (January 21), by

*W. Yardley*, for the lessors of the plaintiff.—This is a proviso for the benefit of the lessors, and the obvious intention of the parties was, that if, by the commission of an act

of bankruptcy, and the issuing of a fiat thereon, it should be made to appear that Evans, the lessee, was hopelessly insolvent, the lessors should have it in their power to get rid of him as a tenant, by determining the lease. The words of the proviso are, that "in case he the said Thomas Evans should at any time or times commit an act of bankruptcy, whereupon a commission should be issued against him, and under which he should be duly found and declared a bankrupt," the right of re-entry shall attach. All that is necessary, therefore, is, that he should *in fact* commit an act of bankruptcy; that a fiat should *in fact* issue against him thereon, and that he should, under that fiat, be "duly," that is, duly in point of form, be found and declared a bankrupt. Here it appears upon the case that all the proceedings were regular in point of form, and that there was in fact a sufficient petitioning creditors' debt, as well as all the other requisites to support the fiat. The terms of the proviso do not require that there should be a *fiat duly issued*, but only that there should be, upon a fiat issued in fact, an adjudication duly made, that is, made regularly in due form.

[He then argued, that upon the facts set forth in the case it appeared that Castles was a dormant partner merely, and therefore the proof by Rees and Guppy alone was sufficient to sustain the fiat: *Lloyd v. Archbottle (a)*. But the Court expressed a clear opinion that no such inference could be drawn from the facts stated.]

*Jervis, contra*.—The question is, what was the proper construction of this lease on the day when it was made. Provisoes for re-entry are to be construed strictly; the law abhors a forfeiture; and the lease is not to be avoided unless the construction be clear in favour of the lessor. Now here it is required, that, in order to create a forfeiture, the lessee shall have been "*duly found and declared a bankrupt*."

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(a) 2 Taunt. 243.

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Surely, that must mean that he shall be found and declared a bankrupt upon due and legal proof of all the requisites to support the commission. Under the 24th section of the Bankrupt Act, 6 Geo. 4, c. 16, the commissioners have authority to adjudge the party a bankrupt only “upon proof made before them of the petitioning-creditor’s debt or debts, and of the trading and act or acts of bankruptcy.” That must mean, upon legal and sufficient proof of all these matters. If there be no good petitioning creditors’ debt proved, the commissioners are altogether without jurisdiction, so that perjury cannot be committed in evidence given before them: *Reg. v. Ewington (a)*. Construing, therefore, the words of the proviso, as the Court will do, most strongly against the lessor, they are not satisfied by an adjudication in fact that the lessee was a bankrupt, such adjudication not having been *duly* made, that is, not having been made on due proof of all the requisites to give the commissioners authority to make it.

*Yardley*, in reply.—It is not correct to say that a proviso for re-entry is to be construed with greater strictness than any other contract. In *Doe d. Davis v. Elsam (b)*, Lord *Tenterden* lays it down distinctly, that provisos of this sort are not to be construed with the strictness of conditions of common law; that they are matters of contract between the parties, and should be construed as other contracts, that is, “according to fair and obvious construction, without favour to either side.” Applying that principle of construction, this proviso is satisfied in all its terms by the facts found in this case.

Cur. adv. vult.

(a) 2 M. & Rob. 223.

(b) Moo. & M. 189. But see the words of the same learned

judge, in *Doe d. Palk v. Marchetti*, 1 B. & Adol. 721.

The learned Judges, differing in opinion, now delivered their judgments seriatim:—

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PLATT, B.—The question in this case arises upon a special case, and involves the construction of a proviso in a lease. The proviso was in the following terms:—“That if the said Thomas Evans [the lessee] should assign the lease for all or any part of the said term of forty years, &c., or in case he, the said Thomas Evans, should at any time or times hereafter, during the said term, commit any act or acts of bankruptcy, whereupon a commission or fiat in bankruptcy should or might be issued against him, and under which he, the said Thomas Evans, should be duly found and declared a bankrupt, the term should determine and be void.” It seems to me that, in order to render this lease void (or voidable, I should rather say), it was necessary that Thomas Evans should be *duly* found and declared a bankrupt, not only in mere form, but upon a proper foundation, namely, upon a full and good petitioning creditor’s debt and trading. If this construction does not obtain, then the word *duly* may be entirely rejected; but that word must have some meaning in the proviso. Now a proviso for a forfeiture must be construed strictly; the old text books so lay it down. It is true that Lord *Tenterden* stated, in the case of *Doe d. Davis v. Elsam*, that these provisos are to be construed as mere contracts: so in one view they are, inasmuch as all forfeitures are founded on contracts. Put the case of a proviso for re-entry, rent being in arrear: that, “provided the rent be in arrear for one and twenty days, the lease shall be void.” Can any one say, because the *demand* of rent is not mentioned in the proviso, that it is not necessary in order to work the forfeiture? In the case of *Crusoe d. Blencowe v. Bugby (a)*, it was distinctly laid down by the Court, that

(a) 2 W. Bla. 766 : 3 Wils. 234.

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“the Courts have always held a strict hand over these conditions for defeating leases:” and therefore it seems to me, according to the old doctrine, from which I see nothing to induce me to withdraw, that whenever there is a stipulation for a forfeiture, the case must be clearly and strictly brought within the terms of the condition. The words, “whereupon a commission or fiat in bankruptcy should or might be issued against him,” may well have been inserted for the purpose of giving a *date* to the forfeiture. Suppose the petitioning creditor’s debt was due on the first of January, 1844, and remained unpaid on the first of January in the following year, and that a valid fiat was afterwards sued out, founded upon an act of bankruptcy committed on the first of January, 1845. Although in such case the petitioning creditor’s debt was old enough to support the fiat, provided an act of bankruptcy had been committed in the month of July, 1844, yet that would not be the act of bankruptcy to which the forfeiture would be referred. The lessor might well exact, and the lessee well concede, that an act of bankruptcy founding a valid fiat should operate as a forfeiture, and that the date of such forfeiture should be fixed by the act of bankruptcy upon which a fiat, supported by, amongst other things, a good petitioning creditor’s debt, might issue. The lessee may say, “I may have committed an act of bankruptcy, but if there was no good petitioning creditor’s debt, I was not liable to a fiat, and I have not put myself into the condition of forfeiting the lease unless I am duly made a bankrupt.” And when we look at the history of these provisos, and the manner in which the Courts have treated them, one is led to believe that this must be the reason of the matter. The old provisos providing mainly for forfeiture in the event of an assignment, the Courts of law held that that applied to voluntary assignments only, not to involuntary assignments by operation of law. What is the object here?

It is that the lessor should not have a new tenant of any kind or description, either by the voluntary or involuntary assignment of the lessee, forced upon him without his consent. The lessor provides against his having a new tenant forced upon him, by providing for the forfeiture of the lease in case of bankruptcy; but it would be carrying the case too far against the lessee, if we held that the forfeiture attached, if he committed an act of bankruptcy upon which a fiat issued, without any petitioning creditor's debt, and where the estate is not validly assigned at all. It seems to me, that we should in that case be carrying the proviso a great deal further than one can suppose was the intention of the parties. I think, therefore, that this second branch of the proviso merely relates to the case where a valid fiat is sued out; and thereby a perfect meaning and application is given to every word of the proviso, because the intention of the lessee was not to lose this property unless by an involuntary *assignment*. And I should not be disposed to lean in favour of forfeitures, notwithstanding any recent decision that may have taken place on that subject. The old law was, that whenever a presumption was to be exercised, it was rather to be made against them than in their favour.

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PARKE, B.—The only question in this case is, whether, according to the true construction of the proviso, it was necessary, in order to determine the term, that there should be a valid fiat in bankruptcy against the lessee.

The terms of the proviso are as follows: [His Lordship read it.] This proviso is a matter of contract, and is to be construed as other contracts are (*a*); and, reading the words in their ordinary sense, and applying the usual rules of construction to them, it seems to me that the lease was avoided by an act of bankruptcy of the lessee, followed by a fiat,

(*a*) Per Lord Tenterden, *Doe d. Davis v. Elsom*, Moo. & M. 189.

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and a finding and declaration of his being a bankrupt by the Commissioners of Bankrupt, made in due form, although there were in fact no sufficient petitioning creditor's debt. The case finds that a debt to a sufficient amount was not proved. If the proviso had been simply "upon the lessee's being *duly* found and declared a bankrupt," I should have thought that the word "duly" would have meant *duly* in all respects, and involved in it the fact of a fiat, and the validity of the fiat, and that it would have been necessary to prove, in order to defeat the lease, not only the issuing of the fiat, but all the requisites to support it, the trading, act of bankruptcy, and petitioning creditor's debt, as well as the adjudication; for otherwise he could not have been *duly* found a bankrupt. But, as this proviso inserts some of the requisites and omits others, the others, upon the principle of "*expressio unius est exclusio alterius*," ought to be construed to be unnecessary; and the word "duly," to be consistent with that context, should be held to mean "in due form," or duly as related to the adjudication only, and to require no more than an adjudication by the commissioners upon the proofs before them. And this construction is far from unreasonable; for why should not the lessor be desirous of getting rid of a tenant, who was insolvent, and had committed an act of bankruptcy, and against whom a fiat had actually issued, and who had been declared a bankrupt by the commissioners, upon proof before them of the petitioning creditor's debt, trading, and act of bankruptcy, though the fiat was invalid? Besides, although the petitioning creditor's debt was insufficient, the fiat might, as the law stood at the date of the lease (April, 1834), be supported at any future time by the extraordinary power given to the Chancellor by the 6 Geo. 4, c. 16, s. 18, to substitute another petitioning creditor; and thus, besides the inconvenience of having an insolvent tenant, the landlord would be kept for a long time in a state of uncertainty whether

the estate would be divested from his tenant or not, and he would be incapable of making a profitable use of it. It is extremely likely that a prudent lessor would wish to guard against such a state of things; at all events, the construction, which, according to the ordinary rules, I put upon the words of the proviso, is by no means unreasonable, but entirely consistent with the probable view of the parties.

But, if the word "duly" is to be interpreted as the defendant contends, that is, that the adjudication is to be founded on a sufficient petitioning creditor's debt, as well as trading and act of bankruptcy, it follows, not merely that the lease would not be forfeited in this case, but would not be avoided, even though the Chancellor should render the fiat valid, by substituting another petitioning creditor's debt, and so vest the leasehold estate in the assignees, for still the *adjudication* would not have been *duly* made. But if the word "duly" is construed "in due manner," or duly with respect to the adjudication only, this inconvenience would not follow. I think, therefore, that our judgment ought to be for the plaintiff.

POLLOCK, C. B.—The question in this case turns on the legal meaning of a proviso in a lease, by which the lease was to become void in the event of the lessee committing an act of bankruptcy, upon which a fiat should issue, and under which he should be "*duly* found and declared a bankrupt." At the trial, a fiat and adjudication were put in, and an act of bankruptcy was proved, but the petitioning creditor's debt was not proved; and the question is, whether the lessee, under these circumstances, was duly found and declared a bankrupt, within the meaning of the proviso. It appears to me that he was found and declared a bankrupt, but that he was not *duly* found and declared a bankrupt. If the proceedings themselves had been in evidence, and the defect had appeared on the face of the proceedings, and, on

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reading the adjudication, it had turned out, that, by inadvertence, the proof of the petitioning creditor's debt was imperfect, or was wholly omitted, could it be said the trader was duly found and declared a bankrupt, when the finding and adjudication obviously, and on the face of the proceedings, were founded on a mistake? I cannot distinguish this case in principle from the case I am so putting; for there is nothing in the evidence in this case to shew that the actual adjudication in point of fact did not take place by the mere mistake of the commissioners, in thinking that no proof of a petitioning creditor's debt was necessary at all. To hold that a mere formal declaration is sufficient, appears to me to be giving no effect to the word "*duly*." I think that is an important word, and that we ought not to pronounce the lease void on insufficient or imperfect materials, or no materials at all. For these reasons, I think the lessee has not been *duly* declared a bankrupt, and that the defendant is entitled to our judgment.

Judgment for the defendant.

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## IN THE EXCHEQUER CHAMBER.

*(In Error from the Court of Exchequer).*

DEAN v. REGINAM.

April 28.

**THIS** was a proceeding upon a scire facias on an extent.—The writ was tested on the 30th of March, in the sixth year of the reign of her present Majesty, and, on the face of it, was returnable on the 15th day of April, 6 Vict. It stated, that, by an inquisition taken on the 1st day of March, in the same year, before &c., commissioners appointed under a commission issued out of the Court of Exchequer, it was found that the defendant, John Dean, was, on the day of the taking of the said inquisition, justly and truly indebted to her Majesty in the sum of 262*l.* 10*s.*, for the duties of customs on foreign silks imported into the United Kingdom from foreign parts, between the 8th day of February, 1841, and the 14th day of February, 1841; and that the said sum of 262*l.* 10*s.*, and every part thereof, then remained due and unpaid to her Majesty.

The defendant cravedoyer of the commission, which was set out. It was tested the 21st of February, 6 Vict., and on its face was made returnable on the 15th of April, 6 Vict., and it authorised the commissioners therein-named to inquire “whether the said John Dean and F. W. S., or either of them, be *now* indebted to us in any and what sums of money for the duties aforesaid.” The defendant also cravedoyer of the inquisition, which was set out, and pur-

Upon a scire facias to recover a sum of money found due to the Crown for duties of customs, by an inquisition taken under a commission to find debts, it appeared on the record, that the commission, which was tested the 21st of February, and returnable the 15th of April, 1843, authorised the commissioners to inquire “whether J. D. is *now* indebted in any and what sums of money,” &c. The inquisition was taken and returned on the 1st of March, 1843, and the jury found that J. D. was, on the day of taking that inquisition, indebted to the Crown in 262*l.* 10*s.*,

for the duty of customs on silk imported by him between the 8th and 14th day of February, 1841, and that the said sum, and every part thereof, still remained due and unpaid:—*Held*, that this finding was good in form, and was warranted by the commission.

The scire facias was tested the 30th of March, 1843:—*Held*, that its having issued before the return day of the commission, was a mere irregularity, and not ground of error.

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ported to have been taken on the first day of March, 6 Vict.; and it was thereby found by the jury, "that John Dean, importer of foreign silks, in the said commission named, is, *on the day of taking this inquisition*, justly and truly indebted to her Majesty in the sum of 262*l.* 10*s.* for the duties of customs on certain foreign silks, by him, the said John Dean, imported into the United Kingdom from foreign parts, between the 8th day of February and the 14th day of February, 1841, and that the said sum of 262*l.* 10*s.*, and every part thereof, still remains due and unpaid." This inquisition was in fact returned on the 1st of March, 1843.

The defendant then, after protesting, &c., pleaded, that he was not, on the day of taking the said inquisition under the said commission, justly and truly indebted to her Majesty, &c. (traversing the finding in its terms), in manner and form, &c. Issue was joined thereon by the Attorney-General, and on the trial of the cause, a verdict passed for the Crown for 137*l.* 16*s.*, and judgment was given accordingly, and execution awarded for that sum. On this judgment a writ of error was brought into this Court, and the following were the points stated for argument:—

For the plaintiff in error.—That it appears that the finding of the commissioners under the inquisition is not in conformity with the inquiry directed by the commission, inasmuch as the inquiry directed by the commission was, whether any and what debt was due from John Dean to her Majesty at the date of the commission, which was the 21st of February, 1843; but the finding of the jury upon such inquisition was merely that the said John Dean was, on the day of taking the said inquisition under the commission, which was on the 1st day of March, 1843, justly and truly indebted to her Majesty in the sum of 262*l.* 10*s.* for the duty of customs on certain foreign silks, by the said John Dean imported into the United Kingdom from foreign parts, between the 8th of February, 1841, and the 14th of February,

1841, and the said sum of 262*l.* 10*s.* was due and unpaid on the day of taking the said inquisition; and that the latter words of the finding do not aid the defect, because the goods might have been imported by the defendant in 1841, but the defendant might not have become indebted in respect of the duties thereon until after the date of the commission. That the writ of *scire facias* was issued before the commission was returnable, and therefore before there was any debt of record. The commission was returnable on the 15th of April, in the sixth year of her Majesty's reign, and the *scire facias* was issued and bore teste the 30th of March in the same year, and was returnable on the same day on which the commission was returnable, namely, the said 15th of April.

For the Crown the following points were stated.—First, that the inquisition is in the form and words prescribed by the invariable practice of the Court, and the course of the Exchequer; second, that inasmuch as the object of the commission, and the inquisition taken under it, is only to found proceedings for the recovery of the debt, it is wholly immaterial whether the Crown debtor should have been indebted at the date of the commission or not, so long as it appears that he is indebted on the date of the inquisition; third, that if it were necessary that it should appear that the Crown debtor was indebted on the date of the commission, it does so appear by the statement that the goods in respect of which the debt arose were imported before that date, inasmuch as the imported necessarily become a Crown debtor from the moment of importation; fourth, that the issuing of the *scire facias* before the day on which the commission is returnable, but after the commission hath been returned in fact, is in conformity with the usage of the court and the established practice; fifth, that the issuing of the writ of *scire facias* before the commission was returnable is at most only a ground for a motion to set aside such writ, and that the defendant cannot now take advantage of it as error;

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of the preceding term, the proceeding was set aside for the repugnancy appearing on the face of the record, and the Court would not allow it to be aided by inserting the true dates. *Wood, B.*, there says, "This is not a case in which we ought to depart from the ancient practice of the Court, which has always been, never to issue a scire facias till after the return of the inquisition; and the practice is founded in good reason, *for the debt is not of record till then.*" Nor can it be said that this is a mere irregularity in the proceedings; it shews the scire facias to have issued altogether without foundation, and is therefore ground of error, as much as if, under the old practice, an action had been commenced without any original writ.

*J. Wilde*, for the Crown.—With respect to the first objection the commission and inquisition follow the forms in ordinary use, as given in *West on Extents*, Appendix, p. 19, and *Manning's Exchequer Practice*, 261. The inquisition would be bad if it were in any other form: *Rex v. Green(a)*. There, an extent having issued against M., dated in February, an inquisition was taken thereon in the following May, upon which the finding was, that G. was indebted to M., in February, "scilicet die emanationis brevis de extent;" and the inquisition was quashed, on the ground that debts are not bound by the teste of the extent, but only a "die captionis inquisitionis." The object of the commission is merely to put upon record the debt due to the Crown, and the real inquiry is, what debt is due at the time of the inquisition taken. [*Maule, J.*—If a debt accrued due after the teste of the commission, and before the date of the inquisition, would the jury be bound or authorised to find that debt?] They might not, perhaps, be bound to find the debt, but such a finding would, according to all the forms, be good. It is not necessary, however, to contend for that in the present

(a) *Bunbury*, 265.

case, because here it is sufficiently clear upon the finding, that the debt accrued due by the importation of foreign customable goods before the date of the commission; it is, therefore, a necessary inference that it was due at the time of the issuing of the commission. The liability to duty accrues immediately upon the importation: *Attorney General v. Ansted* (a). [Maule, B.—Suppose the goods had been imported before the teste of the commission, and bonded, and remained so until the present time, would the jury be bound in that case to find the debt? Then may not the statement in the inquisition be consistent with the fact, that, although imported before the commission issued, they remained in bond until afterwards, and were taken out of bond before the inquisition?] That would be within the terms of the commission; it speaks of a debt which had then accrued, but says nothing as to its being then payable. If the time for payment had not arrived, the defendant might have objected that on the trial of the inquisition, or shewn it by plea to the scire facias.

With respect to the other objection, it is one of a purely technical nature, and amounts at most to a mere irregularity in the writ, which is cured by appearance, and does not constitute any ground of error in the record. The proper mode of taking advantage of it would have been by a motion to set aside the writ for irregularity, as in *Rex v. Pearson*. *Vaughan v. Lloyd* (b) is an authority strongly in point as to this objection. In an *auditâ querelâ*, the party appeared on the scire facias, and demurred, on the ground that it bore date before the *auditâ querelâ*. The Court agreed, that if it had been a scire facias upon a judgment, the defect would not have been cured by appearance, because there the scire facias is the foundation and quasi an original, and the judgment is given upon it; but that, in the case before them the

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(a) 12 M. & W. 520.

(b) 1 Ventr. 7.

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scire facias is only to bring the party in to answer, and in the nature of a mesne process, and the judgment was given upon the auditâ quarelâ; and therefore they disallowed the demurrer. So here, the commission and inquisition, and not the scire facias, are the foundation of the proceedings; and therefore a wrong date to the scire facias is a mere irregularity, and not ground of error. In *Read v. Wilmot* (a), the defendant, in an action for false imprisonment, justified under a capias directed to him upon a suit commenced against the plaintiff in an inferior court. The plaintiff demurred, on the ground that it was not shewn that a summons was issued first, and inferior courts can award no capias but upon a summons first returnable. In giving judgment, *Hale*, C. J., said, that "though upon a writ of error this matter was not assignable, because a fault in the process was aided by appearance," &c., yet false imprisonment lay on it. In *Robert v. Andrews* (b), a writ of account was brought in Norfolk, and the capias ad computandum was awarded to the sheriff of London, instead of the sheriff of Norfolk; and Lord *Coke* held, "that there having been an appearance on the process, it was made good, and the defect was no ground of error." The inquisition in this case was in fact returned before the scire facias, which is founded upon it, issued, and an immediate extent might have issued upon it: *West on Extents*, 48. The apparent repugnancy in the teste is quite immaterial.

*Chambers*, in reply.—The commissioners could have no authority to swear the witnesses examined before them on any other point besides that specified in the commission; and an indictment for perjury before them could not have been sustained, for the allegation of materiality could not have been established. The entries referred to on the other side are merely forms, and cannot be used to cure an ob-

(a) 1 Ventr. 220.

(b) Cro. Eliz. 82.

jection of substance. *The Attorney-General v. Ansted* is rather in favour of the plaintiff in error: there the Court proceeded on the ground that not only the duties were originally payable by the importer, but the time for payment of them had arrived. But here it is quite consistent with the finding, that the liability which existed before did not become a debt payable to the Crown until after the date of the commission.

As to the other point, he relied on *Rex v. Pearson*, in which the Court treated it as a repugnancy and contradiction, and not as a mere irregularity.

*J. Wilde* claimed, on the part of the Crown, and was allowed, the general reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

TINDAL, C. J.—The first objection raised on this record is, that the finding of the commissioners under the inquisition is not in conformity with the inquiry directed by the commission. The commission, as it appears on the record when set out on oyer, directs the commissioners to inquire whether John Dean is now indebted to her Majesty in any and what sums of money, for the duties aforesaid; and the commission is tested on the 21st of February, in the 6th year of her Majesty's reign. It is argued, that the commissioners are confined to the inquiry whether John Dean was indebted on that day. The inquisition, which is also set out on the record, was taken on the 1st of March in the same year, and the commission finds, on the oath of good and lawful men therein mentioned, "that John Dean, on the day of taking the inquisition, is justly and truly indebted to her Majesty in the sum of 262*l.* 10*s.* for duty of customs on certain foreign silk by him the said John Dean imported into this kingdom from foreign parts, between the

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8th day of February, 1841, and the 14th day of February, 1841; and that the said 262*l.* 10*s.*, and every part thereof, still remains due and unpaid." We are of opinion, that there is no inconsistency whatever between the finding of the jury and the authority given to the commissioners; for the inquisition finds the duty to have become due on the 14th of February, 1841; and, as the inquisition further proceeds to find that it still remained due and unpaid on the 1st of March, the day on which the inquisition is taken, it follows necessarily that the jury find the duty to be due on the 21st of February, the day on which the commission was issued: indeed, it is manifest from the special finding of the origin of the debt, that it must have been a debt from the 14th of February, 1841, for it has been decided that the importer of goods from a foreign country becomes liable on importation to the duties of customs payable thereon: *The Attorney-General v. Ansted*: and the latest day of the importation in this case is found to be the 14th of February. But even if the origin of the debt had not so distinctly appeared on the inquisition, it appears, from the inspection of a great number of commissions, and inquisitions taken thereon, with which we have been furnished, from the year 1777 downwards, that the commissions and inquisitions have always been framed in the same precise form as the present; so that the course and practice, which is the law of the Court, have been a sufficient sanction for the form in which the documents in question are issued, even without any other answer to the objection just taken.

The second objection raised upon the record was, that the writ of scire facias issued before the commission was returnable, and therefore before any debt appeared upon the record; the commission being returnable on the 15th of April, and the scire facias bearing teste on the 20th of March, and returnable the 15th of April. But we are of opinion that the objection amounts only to an irregularity, and not to error on the record. In the case of *Rex v. Pear-*

*son*, on which the plaintiff in error relies, the objection, which is precisely the same as the present, was treated by the defendants as matter of irregularity only, and so held by the Court. The scire facias, in this case, is in the nature of process to bring the party into Court to answer; and if the teste of mesne process is too early, that does not make the process a nullity, but irregular only.

We therefore think that the judgment of the Court of Exchequer must be affirmed.

Judgment affirmed.

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END OF EASTER TERM.

REPORTS OF CASES  
ARGUED AND DETERMINED  
IN  
**The Courts of Exchequer**  
AND  
**Exchequer Chamber.**

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TRINITY TERM, 9 VICTORIÆ.

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1846.

May 22.

LAMERT v. HEATH.

The defendant, a share broker, bought for the plaintiff scrip certificates, which were sold in the share market, at a premium, as "Kentish Coast Railway scrip," and were signed by the secretary of the railway company. The genuineness of this scrip was afterwards denied by the directors, who alleged that it was issued by the secretary without authority. In an

DEBT for money had and received by the defendant to the use of the plaintiff, for interest, and on an account stated.—Plea, *nunquam indebitatus*.

At the trial, before *Pollock*, C. B., at the sittings in London after last Michaelmas term, it appeared that the action was brought by the plaintiff against the defendant, a stockbroker, to recover back the sums of £150 and £282 10s., which had been paid by the plaintiff to the defendant for the purchase of 280 scrip certificates of shares in the "Kentish Coast Railway Company." It appeared that the company was formed in the latter part of the year 1844. Letters of allotment were issued, and deposits paid thereon, partly at the London Joint Stock Bank and partly at the offices of the company; and scrip certificates, signed by the secretary, were, on such deposits being made, issued from action to recover back from the defendant the price paid to him by the plaintiff for this scrip, and for his commission, on the ground of its not being genuine:—*Held*, that the proper question for the jury was, whether what the defendant intended to buy was that which was sold in the market as Kentish Coast Railway scrip.

the offices of the company, and were the subject of sale and purchase in the money market until June 1845, when the scheme was abandoned. The directors then refused to return any of the deposits which had been paid in to the offices of the company, on the ground that those payments had been received and the scrip issued thereon without their authority, and they denied the genuineness of the scrip so issued. The plaintiff sought to recover in this action, on the ground that the scrip bought for him by the defendant was of this description, and therefore not genuine "Kentish Coast Railway scrip." The Lord Chief Baron left it to the jury to say whether the scrip bought by the defendant for the plaintiff was genuine scrip of the Kentish Coast Railway Company or not. The jury found that it was not, and gave a verdict for the plaintiff, damages 432*l.* 10*s.*

In Hilary term, *Willes* obtained a rule nisi for a new trial, on the ground of misdirection; against which,

*Jervis*, *Montagu Chambers*, and *Hugh Hill* now shewed cause.—The order of the plaintiff to the defendant was to buy scrip of the Kentish Coast Railway Company. That order was not fulfilled by the purchase of that which afterwards turned out to be a spurious article, not issued or authorized by the company. It is not like the case of a chattel which has acquired a conventional name, like the "Patent Smoke-consuming Furnace" (*a*), and which is sold without a warranty. This is no more a real article than the forged Exchequer Bills, which also passed current in the market. The parties who paid money for them would be entitled to recover it back: *Jones v. Ryde* (*b*). [*Alderson*, B.—But suppose they had only been irregularly issued, without the observance of certain formalities which would bind the Government; would the same rule apply? The ques-

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(*a*) See *Chanter v. Hopkins*, 4 M. & W. 399.

(*b*) 5 Taunt. 488.

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tion here is, was it not for the jury to say, whether the plaintiff bargained for real Kentish Railway scrip, or for that which was in the market as Kentish Railway scrip: if for the latter, he has had what he bargained for. *Rolfe, B.*—The question is not whether it was the real scrip of the company, but whether it was the scrip which the plaintiff contracted to buy.]

*Martin and Willes*, in support of the rule, were stopped by the Court.

ALDERSON, B.—The question is simply this—was what the parties bought in the market “Kentish Coast Railway scrip?” It appears that it was signed by the secretary of the company; and if this was the only Kentish Coast Railway scrip in the market, as appears to have been the case, and one person chooses to sell, and the other to buy that, then the latter has got all that he contracted to buy. That was the question for the jury, but it was not left to them: the rule must therefore be absolute for a new trial.

POLLOCK, C. B., ROLFE, B., and PLATT, B., concurred.

Rule absolute (*a*).

(*a*) See *Mitchell v. Newhall*, ante, 308.

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BARNETT v. SIR HENRY LAMBERT.

May 23.

**ASSUMPSIT** for goods sold and delivered, and on an account stated. Plea, non assumpsit.

At the trial, before *Pollock*, C. B., at the sittings in London after Easter Term, it appeared that this action was brought by the plaintiff, a stationer in London, against the defendant, as one of the provisional committee of the "Great Welsh Junction Railway," to recover the price of stationery supplied on the order of the secretary of the company. The company was formed in June 1845. Shortly afterwards, the secretary wrote to the defendant, requesting him to allow his name to be placed on the provisional committee. On the 17th of July, the defendant wrote an answer to the secretary, in which he consented to be placed on the provisional committee, but stated that "he concluded his liability would be limited to the amount of his shares." His name was first published in the newspapers as one of the provisional committee, on the 21st of August. On the 15th of October, he attended a meeting of the committee, and acted as chairman. The goods in question were supplied at various periods, from June to December 1845; they were used at the meetings of the provisional committee; but it did not appear that the defendant knew anything of the plaintiff, or had had any communication with him.

Upon these facts, the Lord Chief Baron directed the jury that the defendant was liable for the price of the goods which had been supplied by the plaintiff after the 17th of July, when the defendant agreed to become a member of the provisional committee; and the jury accordingly found a verdict for the plaintiff for that amount; leave being reserved to the defendant to move to enter a nonsuit, or to reduce the damages to such amount as the Court should think fit.

The defendant, in answer to an application from the secretary of a railway company to allow his name to be placed on the provisional committee, wrote to him consenting to do so, and stating that "he concluded his liability would be limited to the amount of his shares." His name was accordingly published in the newspapers as one of the provisional committee, and on one occasion he attended and acted as chairman at a meeting of the committee.

*Held*, that he was liable for the price of stationery supplied by the plaintiff, on the order of the secretary, and used by the committee, after the date of his letter to the secretary.

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*Humfrey* now moved accordingly.—The evidence given at the trial did not establish any legal liability in the defendant for the price of any of these goods. The secretary had no authority in law or in fact to pledge the credit of the defendant to the plaintiff. [*Pollock*, C. B.—The defendant wrote and agreed to become one of the provisional committee, for the management of the affairs of the company: surely that is an authority to the secretary to pledge his credit, at all events for necessaries like these.] This is not the case of an ordinary partnership, in which there is a community of profit and loss, and each partner has therefore, by law, an implied authority to contract on behalf of his co-partners. The shareholders in a railway company can have no implied authority to bind each other to an unlimited extent: nor have the provisional committee any authority to pledge the credit of the shareholders; they would have a fund in their hands, by means of the deposits, out of which to defray such expenses as these. The case of *Todd v. Emly* (a) is strongly in point for the defendant. That was an action to recover the price of wine furnished to a club, of the committee of which the defendants were members; it was proved that the wine was ordered by the house-steward under the authority of the committee, but nothing appeared beyond the fact of the defendants being members of the committee. It was held that the question for the jury was, whether the defendants had individually authorised the making of the contract in the ordering of the wine. Lord *Abinger*, C. B., there said, “It is fit that this case should be considered again, as it is one of considerable difficulty. Supposing the jury to have been of opinion, that the majority of the committee had a right to bind the minority, they might still think that the defendants had never done anything to shew that they concurred in the authority given to the house-steward; yet upon the general

(a) 8 M. & W. 505.

summing up of my Lord *Denman*, they might come to the conclusion that the defendants were liable." And *Alderson*, B., said, "In order to make the case out, and to establish the liability of the defendants, the jury should be satisfied that what was done was not only done within the knowledge of the committee generally, but that it was within the particular knowledge of the two defendants." [*Alderson*, B., referred to *Flemyng v. Hector* (a).] That case is so far distinguishable from *Todd v. Emly*, that the defendant was not one of the *committee* of the club. There Lord *Abinger*, C. B., said, "I had thought, but without much consideration, at the assizes, that these sort of institutions were of such a nature as to come under the same view as a partnership, and that the same incidents might be extended to them; that where there was a body of gentlemen forming a club, and meeting together for one common object, what one did in respect of the society bound the others, if he had been requested and had consented to act for them. Trading associations stand on a very different footing. Where persons engage in a community of profit and loss as partners, one partner has the right of property for the whole; so, any of the partners has a right, in any ordinary transactions, unless the contrary be clearly shewn, to bind the partnership by a credit." [*Rolfe*, B.—The case of *Tredwen v. Bourne* (b) seems to me to be conclusive against you. It was an action against the defendant, as a shareholder in a mining company, to recover the price of coals supplied to the company; and the acts relied on to connect the defendant with that concern (which was analogous to the provisional committee of a railway company) were certainly weaker than in this case; yet there it was held that the members of the company had authority, by law, in the absence of proof of a more limited authority, to bind each other by dealings on credit, for the purpose of working the mines, if that appeared to be

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(a) 2 M. & W. 172.

(b) 6 M. & W. 461.



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necessary or usual in the working of mines. In *Todd v. Emly*, the demand was for wine; but in this case it is for things which were clearly necessary for the committee as a body, because the committee could not have gone on without stationery.] Suppose the majority of the provisional committee were in favour of ordering certain goods; would the dissentient minority be liable for them? [*Alderson*, B. —That does not appear to have been the case here; if it was, it lay upon the defendant to shew it. I am not prepared to say that the party would be liable in such a case; because he gives no actual authority, and you cannot imply an authority from his dissent.] Here the defendant, by his letter to the secretary, limits his responsibility to the amount of his shares.

But if the defendant is liable at all, it can only be for the goods supplied after the 15th of October, the day on which he attended the meeting of the committee. The mere entry or publication of his name as a member of the provisional committee did not make him responsible, until he acted in that capacity.

POLLOCK, C. B.—There can be no doubt, as it seems to me, that the defendant is liable in this action for the goods which were supplied after he attended the meeting of the provisional committee, and acted as chairman. He must have known that articles of stationery were in use by the committee, and knowing that no money had been raised by subscription, he could not but know they were obtained on credit. At the trial, I thought that the defendant was not liable for any goods supplied before the 17th of July, when he consented to become a member of the provisional committee, but that he was liable for all supplied subsequently, inasmuch as by that letter he gave the secretary authority to pledge his credit for such things as were necessary for the committee as a body. I am still of the same opinion, and think there ought to be no rule.

ALDERSON, B.—I am of the same opinion. The question in this case is, whether the defendant has rendered himself liable for these goods, by reason of his having given authority to the secretary of the company to pledge his credit for them. I think he did give such authority by his letter of the 17th of July, and that he was liable in respect of orders given subsequently, but not in respect of those given previously. By his being “liable,” I mean that, under such circumstances, the Judge ought to direct the jury, and they, as reasonable men, ought to find, that the defendant, as a member of the provisional committee, had constituted the secretary his agent to pledge his credit for all such things as were necessary for the working of the committee, and to enable it to go on. It is a question of fact, and was so treated in *Todd v. Emly*. It is a matter of inference for the jury, to be drawn from a man’s conduct. Where a subscription has been made, and there is a fund, it is not so; because, if you give money to a person to buy certain things with, the natural inference is that you do not mean him to pledge your credit for them. Such things as are the subject of this action were clearly necessary and proper for the committee, as much as would be a room to sit in; and therefore I think it was for the jury to infer whether the defendant gave authority to some one to pledge his credit for them, and that the jury could not have reasonably found otherwise upon that question than they did.

ROLFE, B., and PLATT, B., concurred.

Rule refused.

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*June 3.*

HENRY v. GOLDNEY.

In an action of contract against A., he cannot plead in abatement the pendency of another action for the same cause against B.

**ASSUMPSIT** for work and labour and materials, and on an account stated.

The defendant (who was in fact sued as one of the members of the provisional committee of a railway company) pleaded in abatement, that the said supposed promises in the declaration mentioned were made by the defendant, jointly with one F. Ede, and not by the defendant alone; and that, at the time of issuing the writ in this action, and before the plaintiff's declaring, to wit, on &c., the plaintiff sued and prosecuted a writ of summons out of this court against the said F. Ede, which said writ was so issued, and was a valid writ, and was in existence, and was the commencement of an action against the said F. Ede, at the time of the commencement of this action, and by which said writ our lady the now queen commanded the said F. Ede, &c. (setting out the writ); that the said F. Ede afterwards, to wit, on &c., caused an appearance to be entered, &c., and that the plaintiff afterwards, to wit, &c., declared against the said F. Ede, that he theretofore, to wit, on &c., was indebted to the plaintiff in £6000, for the price and value of work and materials, &c., (setting out the declaration); that the plaintiff issued the said writ against the said F. Ede, and declared thereupon, for and in respect of the same identical breach of the same identical promises, as the breach of the promises and promises in the declaration in this suit mentioned; and that the declaration in this suit contains no other or different breach of promise, or promise or cause of action, than the promises, breach of promise, and causes of action mentioned in the said declaration against the said F. Ede; and that the said writ and action so sued out and prosecuted against the said F. Ede is still depending in this court.—Verification.

The plaintiff's points for argument were, that the plea is

bad, on the ground that this action is maintainable against the defendant, notwithstanding the facts stated in the plea, and on the ground that it is consistent with the plea, that the said F. Ede therein mentioned may have pleaded or may plead in abatement of the action in the said plea stated to have been brought against him by the plaintiff; and on the ground that, by the law of England, an action is maintainable against each of several joint contractors, subject to a plea in abatement for the non-joinder of the other joint contractors.

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*Crompton*, in support of the demurrer.—This plea is clearly bad, as well in substance as in form. This is a novel and unprecedented attempt to set up the pendency of another suit as a defence by a stranger to that suit. The defendant had a clear and convenient remedy, by a plea of the non-joinder, or by an application to the equitable jurisdiction of the Court, if any abuse of the process has been committed. The principle of the plea of *auter action pendent* is, that *the same party* is not to be twice harassed for the same cause of action. It is so laid down in *Sparrow's case* (a), and in Com. Dig., Abatement, (H. 24). But it cannot be any defence in point of law, that another action for the same cause is depending against a stranger. There are, moreover, other important objections to this plea. It is perfectly consistent with the terms of it, that Ede may have died since the commencement of the suit against him. [He was here stopped by the Court.]

*Bramwell*, *contra*.—This plea is, upon legal principles, a good answer to the action. The argument on the other side is, that the defendant ought to have pleaded the non-joinder of Ede in abatement. But that is a very imperfect remedy. For instance, if, after action brought, the party

(a) 5 Rep. 61.

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not joined has left the country, the plea in abatement cannot state, in compliance with the stat. 3 & 4 Will. 4, c. 42, s. 8, that he is resident within the jurisdiction of the Court. It has been already held, in *King v. Hoare* (a), that a *judgment recovered* against one of two joint debtors, without satisfaction, is a bar to an action against the other. The true principle is, that if the defendant shews anything which suspends the action against his co-contractor, he suspends it against himself. In *Boyce v. Douglas* (b), it was ruled by Lord *Ellenborough*, C. J., that where two parties who have been jointly guilty of an assault are sued separately, the pendency of one action may be pleaded in abatement in the other. The case of *The Earl of Bedford v. The Bishop of Exeter* (c) is strongly in point. There an action of *quare impedit* was brought against two; and a plea in abatement, that another *quare impedit* was pending against one of them, was held good. It is difficult to see how that would be a good defence for one of them, when sued jointly with the other, unless it would also have been a good defence for him if sued alone. It was the same amount of vexation for A. and B. to be so sued, as for A. to be sued twice. The law objects to double litigation, be the parties who they may. [*Alderson*, B.—How is A. vexed by an action being brought against B? B. cannot recover against A. his proportion of the costs. All pleas of action pending must go upon the ground of the party being *twice vexed*. *Pollock*, C. B.—The authority in 1st *Campbell* is no more than a dictum, thrown out casually. There is no precedent for such a plea, not only before that dictum, but since.] The same might have been said as to the plea in *King v. Hoare*. In *Rawlinson v. Oriel* (d), again, which was an action of trespass against two defendants, the inclination of the Court appears to have been, that a plea in abatement of an action

(a) 13 M. & W. 494.

(b) 1 Campb. 60.

(c) Hob. 137.

(d) 1 Show. 75; Carth. 96.

pending against one of them was good. The debt is a thing which the party realises and has by suing for it; and if he can recover in both actions, he has it twice. Could a party bring two actions of detinue for the same chattel? [Alderson, B.—You can always prevent him from having the debt twice, by pleading the non-joinder in abatement.] That may be impossible, by reason of the co-contractor being out of the jurisdiction, since the stat. 3 & 4 Will. 4, c. 42. [Pollock, C. B.—We cannot change the rules of pleading because of that statute. We must suppose that it was passed purposely to hamper pleas in abatement. Alderson, B.—The only effect of the statute is, that *joint* contracts, where one of the contractors is out of the kingdom, become *joint and several*. Where is the mischief of that? You admit there may be several actions against joint and several obligors.] That is the obligation they have entered into: and there the plaintiff has not two judgments in respect of the same contract; for, though written on the same paper, they are different contracts altogether. The result of the stat. 3 & 4 Will. 4, is, if this plea be held bad, that, instead of one action against thirty joint contractors, the plaintiff may have twenty-nine actions, against all but the one who is out of the country. Now the principle of the decision in *King v. Hoare* is, that a plaintiff has no right to several judgments for the same cause of action. How strange then is it, that all these actions may be brought, although they cannot have their legal termination by judgment and execution. There is no distinction in principle between the case of joint contractors and joint tortfeasors. Besides, the non-joinder could not be pleaded here, for the defendant would not give the plaintiff a better writ, inasmuch as no action can be brought against Ede pending the former action.

*Crompton* was not called upon to reply.

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POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to our judgment. Here the defendant is not vexed twice by the same proceeding, and therefore that principle has no application. Contracts may be made joint and several; and when that is the case, as in a joint and several bond, an action may be brought against each contractor, although the judgment cannot be enforced against each; for if that is attempted to be done, the Court will give a remedy by *audita querela*, or on motion. With respect to the language of Lord *Ellenborough*, in *Boyce v. Douglas*, it is a mere casual remark, and not called for, and not amounting to a decision, on which no reliance ought to be placed. If that position were correct, and this plea might be pleaded in tort, it might also afterwards be pleaded in contract; but there are no dicta, and no precedents, in support of such a position, except the language of Lord *Ellenborough* in the case referred to. Long before that case, Lord *Holt* had doubted whether, where an action in tort had been brought against *two*, the defendants could plead the pendency of an action against one of them; although there the party was apparently twice vexed for the same cause; but, if the action had been brought against *one*, and not against two, he would not have thought that the principle of not vexing a party twice would apply to the case. Before the stat. 3 & 4 Will. 4, c. 42, the defendant in this case could have pleaded in abatement the liability of other parties; and if an action were brought against all, he could have pleaded the pendency of the other suit, and so compelled the plaintiff to a discontinuance. Then came the statute, with the clause as to the parties being resident within the jurisdiction of the court; and it is argued that we ought, because of it, to mould the rules of pleading, in order to prevent injustice, or to infer that such were the rules of pleading before the statute, that this plea could have been pleaded, otherwise the statute would work injustice. But I think we cannot adopt that argument, or

alter the rules of pleading, merely because the effect of that statute is, in many cases, to take away the application of a plea in abatement. In truth, the act was passed without reference to the rules of pleading; and when one contracting party is out of the realm, its effect may be to make contracts joint and several, which at first were joint only. I do not see any great mischief in that. All injustice may be prevented by an appeal to the equitable jurisdiction of the Court. I agree, however, that a legal right is better than an application to the equitable jurisdiction of the Court; and it is satisfactory to know, that in this case there is an appeal to a court of error, in which our decision, if erroneous, may be corrected. I decide this question on the principle, that the statute has nothing to do with the case. The plea is also defective, in omitting to aver that the third party is alive.

ALDERSON, B.—I am of the same opinion. The principle of the defence of autre action pendant is, that the same man is not to be vexed twice for the same cause. But how does the plea shew that the defendant is twice vexed in this case? He pleads, that Ede is jointly liable with him under a contract, and that Ede has been sued; but the fact of an action having been brought against Ede, does not shew that the same man has been or necessarily will be twice vexed for the same cause; if the defendant follows out the proper proceedings according to law, he certainly will not be. The proper course was, for the defendant to plead the non-joinder of Ede, and so put an end to this action; and then it would be the plaintiff's duty to bring a joint action against the defendant and Ede; and, if the former action were not discontinued, Ede might plead in abatement the pendency of the other action, and that would be a good plea, as well for Ede as for the defendant. The two actions, therefore, cannot go on together, if the parties follow the

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proper rules of defence. The same man need not be twice vexed for the same cause. For these reasons, I am of opinion that the plea is bad, and the plaintiff is entitled to judgment of respondeat ouster.

ROLFE, B.—I am of the same opinion. The case must be considered independently of the stat. 3 & 4 Will. 4, c. 42. If two or more parties had made a joint contract, and one only was sued upon it, his course was to plead in abatement the non-joinder of the others, and the plaintiff was then bound to bring his action against those parties. The statute, however, seems to assume that that course was in many respects inconvenient, as the plaintiff, in many cases, could not in fact go on with his action against all the parties. It therefore required the defendant to shew where the other co-contractors were. The case of *King v. Hoare* has no bearing upon the question. The decision there was, that a judgment recovered against one of two joint debtors is a bar to an action against the other; and it proceeded on the ground, that the plaintiff was going on to judgment, in a matter that had passed in rem judicatam. It is altogether inapplicable to this case.

PLATT, B.—The rule of law is clearly laid down in *The Earl of Bedford v. The Bishop of Exeter*, and in the case of *Rawlinson v. Oriel*, that a man is not to be twice vexed for the same cause. If a party has a legal right he may enforce it, but he ought not to institute two actions instead of one. But the defendant's objection in this case is, that another action is pending against another party, who is alleged to be a joint contractor. But the defendant is not liable to the judgment in that other action; whereas, in the cases I have referred to, the defendant was liable, and therefore the judgment and execution would touch the same person. But here the defendant is not twice vexed; he is in the same

situation as if all had been joined in the action, in which case execution might have been levied upon any of them. The plea is therefore bad, and the plaintiff is entitled to judgment.

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Judgment of respondeat ouster.

WALSTAB v. SPOTTISWOODE.

June 12.

**ASSUMPSIT.**—The declaration stated, that heretofore, to wit, on &c., the defendant and certain other persons, whose names are to the plaintiffs unknown, agreed together to form a certain joint-stock company, called “The Direct Birmingham, Oxford, Reading, and Brighton Railway Company,” for the purpose of making a certain railway, under the powers of an act of Parliament to be applied for in that behalf; the capital of which company was to consist of £2,000,000, in 80,000 shares, at £25 each, to be allotted by the committee of management of the said company to such persons as should apply to them, and as they should select for that purpose; and the plaintiff then, to wit, on &c., at the request of the defendant, applied to the committee of

A railway company was provisionally registered, and a prospectus was issued, which stated the proposed capital to be £2,000,000, in 80,000 shares of £25 each. The plaintiff applied to the provisional committee for seventy shares, in a letter whereby she undertook to accept the same or any less number that they might allot to her,

to pay the deposit of 2*l.* 12*s.* 6*d.* per share thereupon, and to sign the parliamentary contract and subscribers' agreement when required. To this letter she received an answer, signed by the secretary, stating that the committee of management had allotted to her thirty shares, and requesting her to pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 78*l.* 15*s.*, into one of certain banks on or before a day mentioned. The plaintiff accordingly paid into one of those banks, in due time, the deposit of 78*l.* 15*s.*, and received the bankers' receipt for the same. She afterwards presented the receipt to the company, and made several fruitless applications to the committee for scrip, and at length was informed that the directors had come to the resolution not to issue any scrip, and that the greater part of the deposits had been expended, and the balance would be rateably divided. It appeared that the directors, finding it impossible to go to Parliament in the ensuing session, had determined not to issue any scrip; and that, of the entire number of 80,000 shares, 70,000 were allotted, but deposits were paid on 4000 only, producing altogether the sum of £10,500.

In an action by the plaintiff to recover back, from a member of the managing committee, the sum of 78*l.* 15*s.* so paid by her as deposits on the shares allotted to her :

*Held*, first, that there was sufficient evidence of the final abandonment of the project.

Secondly, that, on its abandonment, under the circumstances above stated, the plaintiff was entitled to recover back, as money had and received to her use, the whole sum so paid by her.

An association of this nature does not amount to a partnership.

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management for, and there were then allotted to her by the said committee, by a certain letter of allotment, to her directed and delivered, divers, to wit, thirty of the said shares; and thereupon then, in consideration of the premises, and that the plaintiff, at the instance and request of the defendant, would, on or before the 24th day of October, A.D., 1845, pay to one of certain banking companies in the said letter of allotment named, whereof one was a certain banking company, called "The London Joint-stock Bank," to the account of the said joint-stock railway company, a deposit of 2*l*. 12*s*. 6*d*. upon each of the said thirty shares, making in the whole the sum of 78*l*. 15*s*., and would present the said letter of allotment, with a receipt of one of the said banks for the said deposit appended thereto, to the defendant or his agents in that behalf, at the office of the said company, and execute a certain contract relating to the formation of the said company, called "the Parliamentary contract," and a certain agreement also relating to the formation of the said company, called "the subscribers' agreement," within a certain reasonable time appointed on that behalf, to wit, on the 27th day of October, A.D., 1845, or within a reasonable time then next following, the said contract and agreement to be prepared by the defendant, and ready for execution at such time as aforesaid, the defendant then promised the plaintiff to give her, in exchange for the said letter of allotment and banker's receipt, scrip certificates for the said thirty shares, (that is to say), certain certificates in writing, purporting that the holder or holders thereof were entitled to thirty shares in the capital of the said Joint-stock Railway Company, and to be shareholders thereof in respect of such shares; and the plaintiff avers, that she, confiding in the said promise of the defendant, afterwards, and within the time limited in that behalf, namely, on the said 24th day of October, 1845, paid to the said London Joint-stock Bank, on account of the said railway company, the said deposit on each of the said shares, amounting in the whole to the said

sum of 78*l.* 15*s.*, and then received from the said bank a receipt for the same appended to the said letter of allotment; and afterwards, and within the time appointed in that behalf as aforesaid, and at a proper and reasonable time in that behalf, to wit, on &c., the plaintiff presented the said letter of allotment, with the banker's receipt appended thereto, at the office of the said railway company, to wit, at Moorgate-street, in the City of London, to the defendant, and then was, and always since has been, ready and willing, and then offered to the defendant, to deliver to him the said letter of allotment and banker's receipt appended thereto, and to execute the said Parliamentary contract and subscribers' agreement, and to receive such scrip certificates as aforesaid in exchange for the said letter of allotment and the banker's receipt, and then requested to exchange the said letter of allotment, with the said banker's receipt appended thereto as aforesaid, for such scrip certificates as aforesaid, and a reasonable time for the defendant so to do had elapsed long before this suit commenced: yet the defendant, not regarding his said promise, did not nor would, at the time when he was so requested by the plaintiff so to do, or at any time before or since, exchange the said letter of allotment, with the said banker's receipt appended thereto, for such scrip certificates as aforesaid, or deliver such scrip certificates as aforesaid to the plaintiff, but then wholly neglected and refused, and still neglects and refuses so to do, and then wholly discharged the plaintiff from executing the said contract or agreement. Breach, &c. There were also counts for money had and received, money paid, money lent, and on an account stated.

The defendant pleaded non assumpsit, and also several special pleas, which it is not necessary to notice.

At the trial before *Pollock*, C. B., at the London sittings after last Hilary Term, the following facts appeared in evidence:—The defendant was a member of the provisional and managing committee of the “Direct Birmingham, Ox-

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ford, Reading, and Brighton Railway Company," which was provisionally registered in August 1845. The capital was announced in the published prospectus to be £2,000,000, in 80,000 shares of £25 each. On the 7th of October, 1845, the plaintiff, Mrs. Walstab, made the following application for an allotment of shares in the undertaking addressed to the provisional committee:—

"I request that you will allot me seventy shares of £25 each in the Direct Birmingham, Oxford, Reading, and Brighton Railway; and I do hereby undertake to accept the same, or any less number that you may allot to me, and to pay the deposit of 2*l.* 12*s.* 6*d.* per share thereupon, and sign the Parliamentary contract and subscribers' agreement, when required.

(Signed) "ELIZABETH WALSTAB."

To this letter the following answer was returned on the 18th of October:—

"W. 283.

"Letter of allotment—(Not transferable).

"Direct Birmingham, Oxford, Reading, and Brighton Railway.

"Capital, £2,000,000, in 80,000 shares of £25 each.

"Deposit, 2*l.* 12*s.* 6*d.*

"No. of Letter, 123.

"No. of Shares, 30.

"46, Moorgate-street, London,  
 October 18, 1845.

"The committee of management have allotted to you thirty shares in this undertaking; and I am directed to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 78*l.* 15*s.*, into one of the under-mentioned banks, on or before Friday, the 24th day of October, 1845, or this allotment will be null and void.

"This letter, with the banker's receipt appended thereto, will be exchanged for scrip upon your presenting it at the

offices of the company, and executing the parliamentary contract and subscribers' agreement, which will lie at the above offices on and after the 24th of October, and due notice will be given when the deeds will be sent into the country.

"I am, your obedient servant,

"J. B. RAYNER, Secretary.

"To Mrs. Elizabeth Walstab."

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The letter then contained a list of the bankers to whom the deposits were made payable. On the 24th of October, the plaintiff paid to the company 78*l.* 15*s.* as a deposit on thirty shares, and received the banker's receipt for the same. The plaintiff's son presented the banker's receipt to the company, and made several fruitless applications to the committee for scrip; and was finally informed, in the month of November, that the directors had come to the resolution not to issue any scrip. He was also informed, that the greater part of the deposits had been expended, and that the balance would be rateably divided. It appeared that the directors, finding it impossible to go to Parliament during the ensuing session, had determined, on the 27th of November, not to issue any scrip. Of the entire number of 80,000 shares, 70,000 were allotted, but deposits were paid upon 4000 only, producing altogether the sum of £10,500.

At the trial, the following objections were taken on the part of the defendant. First, that the letters of the 7th and 18th of October did not prove any contract; or if they did, it was not the contract alleged in the first count, inasmuch as they did not shew an agreement to give scrip certificates for shares, but only to allot shares. Secondly, that the contract, if any, being signed, not by the defendant, but by the secretary of the company, was not personally binding on the defendant. Thirdly, that a contract to give scrip was illegal under the stat. 7 & 8 Vict. c. 110. Fourthly, that the count for money had and received could not be sustained; that there was no failure of consideration on the

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ground of the abandonment of the undertaking: for, first, there was no sufficient evidence that it had in fact been abandoned; and secondly, the provisional committee had no power to abandon it.

For the plaintiff it was contended, on the authority of the case of *Nockells v. Crosby* (a), that the provisional committee were bound, on the failure of the undertaking, to return the plaintiff's deposit; for that the expenses of an abortive scheme must be borne by the projectors of it; and the plaintiff was therefore entitled to recover, either on the special count, or, at all events, on the count for money had and received.

The Lord Chief Baron overruled the objections, and under his direction a verdict was found for the plaintiff, damages 78*l.* 15*s.*, leave being reserved to the defendant to move to enter a nonsuit.

In Easter Term, *Martin* obtained a rule nisi accordingly; against which

*Jervis* and *Willes* shewed cause in this term (May 29).—First, the plaintiff is entitled to recover on the special contract alleged in the first count. The company were bound, on the allotment of shares being made, and on payment of the deposits thereon, to exchange the letter of allotment for scrip. It will be said on the other side, that the letters of the 7th and 18th of October, taken together, shew no *contract*, but that the latter amounted merely to an *intimation of an intention*, on the part of the directors, thereafter to give scrip in exchange for it. But this argument cannot be supported: nor does it make any difference that the plaintiff's application was for a greater number of shares than was afterwards allotted to her. Suppose a man offered to another to give £50 for a mare, and ten days afterwards the latter wrote him a letter saying, that if he paid the sum of £50

(a) 3 B. & C. 814; 5 D. & R. 751.

into a certain bank, he should have the mare and her foal; would that be called a mere intimation? would it not be a *contract* to deliver the mare and her foal on payment of the £50? This is merely the case of one party contracting to do one thing, if the other party will perform two. There is first a proposal on the part of the plaintiff, which is modified by the qualified acceptance of the company, and the bargain is completed by the final acceptance of the plaintiff.

Secondly, it is said that the defendant cannot be bound, because this was a company only provisionally registered, which therefore had no authority to issue scrip: but it is clear from the several provisions of the 7 & 8 Vict. c. 110, that this is otherwise. The 24th section, in particular, which imposes a penalty upon the issuing of scrip *before* provisional registration, seems to imply that scrip may be issued *after* such registration. [They referred also, on this point, to the 23rd, 25th, 51st, and 52nd sections of the statute.]

The principal question in this case, however, arises upon the second count, for money had and received. Now the principle established by the case of *Nockells v. Crosby* is, that the promoters of an abortive company are bound to return to the subscribers the *earnest* received from them, and themselves to bear the expenses of the undertaking. That was a case in which a scheme for a *tontine* was put forth, stating that the money subscribed was to be laid out at interest; and after some subscriptions had been paid to the directors, but before the money was so laid out, the directors determined to abandon the project. The Court held that each of the subscribers was entitled, in an action for money had and received, to recover the whole of the money advanced by him, without deduction of any part towards the payment of the expenses already incurred. *Bayley, J.*, there says, "On all projects some expense must be incurred before many members join the concern. Upon whom shall that fall? Undoubtedly, if the scheme prove abortive, it should fall upon the original projectors, and not upon

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those who advanced their money upon the faith of its going on." *Holroyd, J.*, says, "It appeared to me, at first, that this was very like the case of a partnership, which I put during the argument; but here the concern was never really set going; and I think that the expenses incurred in setting a scheme on foot, are not to be paid out of the concern, unless they are adopted when it is actually in operation." And *Littledale, J.*, says, "The plaintiff is entitled to recover, upon this general principle, that if persons set a scheme afoot, and assume to be the directors or managers, all the expenses incurred before the scheme is in actual operation must, in the first instance, be borne by them." And he puts the case of there being one subscriber only, in which case, he says, the hardship and injustice would be monstrous that all these expenses should be cast upon him. [*Alderson, B.*—In *Pitchford v. Davis*(a), a company was projected, and a prospectus issued, stating the proposed capital to consist of 10,000 shares of £25 each. The directors entered into contracts at a time when a small portion only of that capital had been raised; and it was held that a subscriber, who had made deposits, was not liable upon such contracts, without proof that he knew of and assented to their proceeding on the smaller capital, or expressly authorised the making of the contracts. Does not the principle of that case apply to the present?] Unquestionably it does. If the promoters of a scheme of this nature think fit to proceed before the whole of the capital is subscribed for, they do so at their own risk. The party subscribes on the faith that his subscription is to form an integral part of a fund amounting to 80,000 times 2½ guineas; and until that fund is raised, the directors cannot pledge his credit. Until the whole is subscribed, the deposit of each subscriber is a mere *earnest*: then it becomes a part of the agreed capital. And the stat. 7 & 8 Vict. c. 110, does not alter the effect

(a) 5 M. & W. 2.

of the contract between the promoters and the subscribers. The former are merely put in the same position, after the concern is provisionally registered, as they were at common law without any provisional registration.

But farther, this deposit of 2*l.* 12*s.* 6*d.* is composed of two sums, of 2*l.* 10*s.*, which is the 10 per cent. on each share, required by the Standing Orders of Parliament to be deposited with the Accountant-General, and 2*s.* 6*d.*, which may be considered as paid to be applied to the preliminary expenses. The former sum is appropriated to the express purpose for which it is received, and not having been so applied, the plaintiff is clearly entitled to recover it back. And with respect to the 2*s.* 6*d.*, that cannot be retained for the preliminary expenses until the whole amount of deposits has been paid up. [They cited *Fox v. Clifton* (a), *Bourne v. Freeth* (b), and *Lake v. Duke of Argyll* (c).]

Lastly, it is said that the secretary had no power to bind the defendant by making this contract. But by the prospectus, applications are to be made to the officer of the company, and the plaintiff's letter is answered by him as the agent of the provisional committee, to whom her application for shares was addressed.

*Martin, F. V. Lee, and Peacock*, contra. (May 29 and 30.)—First, the special contract alleged in the first count was not proved. The documents which were read in evidence must be taken together, in order to see what the contract was. It consists in the letter of the 7th of October, and the first paragraph of the letter of the 18th. The plaintiff's contract attached on her thirty shares being allotted; there was then a complete obligation upon her to sign the parliamentary deed, and pay the deposit. She did nothing, and was not called upon to do anything, except what she did and was bound to do upon the allotment being

(a) 6 Bing. 776; 4 M. & P. 676.

(c) 6 Q. B. 477.

(b) 9 B. & C. 632; 4 Man. & R. 512.

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made to her. There was no consideration for any promise to exchange the letter of allotment for scrip or shares: the allotment was all the plaintiff asked for, and she had all for which she bargained.

Secondly, the count for money had and received was not established. In the first place, the prospectus contains no engagement on the part of the provisional committee to go to Parliament at all in the then ensuing session, and there is really no evidence to shew that the scheme has been finally abandoned. For aught that appears, it is an open contract to the present hour. But even if this be otherwise, there is no failure of consideration sufficient to sustain the action. Nor can any distinction be drawn between the 2*l.* 10*s.* and the 2*s.* 6*d.*, nor was any such attempted at the trial: the case was rested altogether on the ground of a general failure of consideration, and not on that of a specific appropriation of any part of the deposit. Now it is obvious, that, in such an undertaking, expenses must necessarily be incurred ab initio—as for rent of offices, stationery, advertising, &c. &c.: and the subscribers, as well as the promoters, know this to be the case. Why should not such expenses be borne by all the parties, unless there be fraud? There is no difference in their situation, except that one is the first suggester of the scheme to the others. In truth, a party subscribing to such an undertaking becomes a *quasi* partner, and cannot receive back the whole of the money which he deposits for the necessary expenses, in case of the scheme being unsuccessful. If twelve individuals set on foot a project, and, without fraud, ask fifty others to join them in taking shares, and they agree to do so, why should the expenses fall exclusively on the twelve original projectors, instead of being borne equally by all the parties? *Nockells v. Crosby* is quite distinguishable; that was the case of a tontine, where all the money subscribed was to be invested at interest; and there, also, the scheme had absolutely and finally failed. But a subscriber to a railway company perfectly well knows that

his money is to be applied to a common purpose, and that the promoters must use it in taking the necessary steps for the formation of the Company; and surely, under such circumstances, he authorizes them to expend it in payment of the necessary preliminary expenses. An ordinary joint stock company, no doubt, cannot go on with their manufacture or their trade until all the capital has been subscribed for; but there the contract is made for the carrying on of the trade or manufacture itself, not for preliminary matter until the company is formed. It may be that the plaintiff would not, under these circumstances, be liable to a creditor of the concern; but that is not the question. Each subscriber brings his money into hotchpot, for carrying on the scheme for the joint benefit of all. It is paid as a contribution to a joint fund for a quasi partnership. It is true that, in *Kempson v. Saunders* (a), money which had been paid for shares in an abandoned undertaking was allowed to be recovered back. But the authority of that case is very questionable: and *Holmes v. Higgins* (b), confirmed by *Lucas v. Beach* (c), went upon the principle, that persons associating together and subscribing money for the purpose of making a railway, are *partners* in the undertaking. The plaintiff has her remedy in equity; and though the sum in dispute in this case is so small, it is better to lay down the general principle, that a party, who thinks fit to run the risk of gaining or losing by embarking in a concern of this kind, shall be without remedy at law.

Lastly, there was no sufficient evidence of the dissolution of the Company. The provisional committee still retain their powers under the 7 & 8 Vict. c. 110, s. 23. They were not bound to go to Parliament in the next session; and although they had failed to do so, they might afterwards be compelled by the subscribers to proceed. [*Alder-*

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(a) 4 Bing. 5; 12 Moore, 44.

(b) 1 B. &amp; Cr. 74.

(c) 1 Man. &amp; G. 417; 1 Scott,

N. R. 350.

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son, B.—Is there any authority that the promoters of a scheme of this kind may not abandon it?] Yes; *The Kidwelly Canal Company v. Raby* (a). [*Alderson*, B.—That was the case of a company actually formed and incorporated: this is a mere project.] Nevertheless, they could not dissolve it without the consent of all, or at least of the majority of the subscribers, and the declarations of any other member of the committee that it was abandoned were not at all binding on the defendant.

But further, the secretary had no power to issue scrip at all. The statute does not give any authority to do so. The 24th section subjects the parties to a penalty if it be issued before provisional registration, but it is not therefore lawful after. If not absolutely illegal, it is against the policy of the statute. There is, at all events, a clear distinction between *scrip* and *shares*. [On this part of the case they cited *Jackson v. Cocker* (b), *Leeman v. Lloyd* (c), and *Mitchell v. Newhall* (d).]

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action of assumpsit. The declaration contained a special count, founded on an alleged contract to deliver scrip; there was also a count for money had and received. At the trial before me, on the 27th of February, it appeared that the defendant was a member of the provisional committee of the Direct Birmingham, Oxford, and Brighton Railway Company, registered provisionally under the 7 & 8 Vict. c. 110. The prospectus announced the capital to be £2,000,000, in 80,000 shares, of £25 each share. The deposit required was stated to be 2*l.* 12*s.* 6*d.* per share. On the 7th of October, 1845, the

(a) 2 Price, 93.

(b) 4 Beav. 59.

(c) 14 Law J., N. S., Q. B., 165.

(d) Ante, 308.

plaintiff applied to the provisional committee for shares, according to the form directed by the committee, (which form it is not necessary now to state). On the 18th of October, the plaintiff received a letter of allotment in the following form. [His Lordship read it, as ante, p. 504].

This letter was signed by the secretary, and set out the names of the several bankers; and the plaintiff, in due time, paid the deposit on the thirty shares into the London Joint-stock Bank, the bankers of the Company, and on the 27th of October applied for scrip. The time for delivering the scrip was extended by the provisional committee to the 6th of November. On the 12th of November the plaintiff applied again; and, after several other fruitless applications at the office of the Company, the plaintiff was told by the secretary, that the directors did not mean to issue scrip; and upon the plaintiff requiring her money to be repaid, the final answer given at the office by one of the provisional committee, not the defendant, was that a statement would be made of the concerns of the Company, and the surplus would be divided. It was admitted, at the trial, that 40,000 shares had been applied for; 7000 shares had been allotted; but, about the 25th of October, 1845, public confidence in railway schemes having been much shaken, the deposit was paid on 4000 shares only, a number much too small to justify proceeding with the scheme. The plaintiff, failing to get scrip or her money again, brought the present action. At the trial, it was contended by the defendant's counsel that the defendant was not liable under either count of the declaration; that the special count could not be supported; and that the defendant was not liable on the count for money had and received. A verdict was found for the plaintiff under my direction, with liberty for the defendant to move to enter a nonsuit, if there was not evidence to support the verdict: all the points raised by the defendant's counsel being reserved. Accordingly, Mr. *Martin*, in Easter Term, obtained a rule, which was argued on the 29th and

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30th of May last, before me and my Brothers *Alderson*, *Rolfe*, and *Platt*.

For the defendant it was contended, that the contract, as laid in the special count, was not proved, and the defendant was under no contract to deliver scrip. But the argument chiefly turned on the count for money had and received; and it was alleged that the subscribers became a quasi partnership, and that their subscriptions went into a common fund, to be applied for the general benefit, and in consequence that the plaintiff could not sue the defendant at law. A further point made was, that the application being made for an allotment of shares, which in fact had been allotted, the plaintiff had really obtained all she asked for, and had no grounds of complaint; and lastly, it was said that there was no evidence of the concern being at an end, as the defendant was not bound by what another member of the committee stated, and unless the concern was abandoned, money had and received would not lie.

For the plaintiff it was argued, that the special count was proved, and that there was evidence that the concern was at an end, and the case of *Nockells v. Crosby* was cited as an authority. We do not think it necessary to give any opinion on the special count, as to which some doubt may well be entertained, because we are all of opinion that the plaintiff is entitled to recover on the count for money had and received; and as the plaintiff cannot be entitled, in a case like the present, to damages on the first count, for not delivering scrip, as upon a contract broken, and also to have her money returned as on a contract rescinded, we are of opinion that the verdict for the plaintiff on the count for money had and received ought to stand, but that the verdict for the plaintiff on the first count should be set aside, and a verdict entered for the defendant.

With respect to the first point made by the defendant, that the subscribers became quasi partners, and that the subscriptions became a common fund, to be applied for the

general benefit, so that no one could claim back his subscription, we are of opinion that such is not the true result of the publication of the prospectus (by the provisional committee, of which the defendant was one), of the application for shares, and the allotment and the payment of the deposit. We think, in this case, no partnership ever actually commenced. In the case of *Pitchford v. Davis*, it was decided, that where a prospectus was issued for a speculation to be carried on by means of a certain capital, a subscriber did not become a partner unless the terms of the prospectus were in that respect fulfilled: and that decision has been since frequently acted on in this and other courts. In the case of *Nockells v. Crosby*, cited by the plaintiff's counsel, a similar doctrine was held. It appears to us that the application for shares, and payment of the deposit, amounts to nothing, if the shares subscribed for are so few that the concern cannot proceed, and the scheme must necessarily be abortive.

With respect to the point that the plaintiff applied for shares, and that shares were actually allotted, and therefore no action can be sustained; it is a sufficient answer to say, that the allotment of shares in an abortive scheme, which does not correspond with what the prospectus held out, is really not a compliance with the application. If the scheme has wholly failed, and has ceased even as a speculation, nothing whatever has been allotted to the subscriber. But it was urged that there was no evidence of the concern being at an end. We think that the answer given at the office by one of the provisional committee, that a statement would be made, and the surplus would be divided, was evidence to go to the jury that the concern was abandoned; and unopposed as this was by any evidence on the part of the defendant, we think that the jury were well warranted in finding that the scheme was at an end. If so, we think, on the authority of *Nockells v. Crosby*, that the plaintiff is

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entitled, under the count for money had and received, to recover back her deposit.

A question was raised, though not much argued, whether there was any difference between one portion of the deposit and another. It being, as we think, manifest that the deposit of 2*l.* 12*s.* 6*d.* consisted of 2*s.* 6*d.*, being 10*s.* per cent. on the £25, in pursuance of the 23rd clause of the act referred to, and the residue being £10 per cent. required to be deposited by the Standing Orders of Parliament, we think it is clear beyond all doubt, that the amount paid in order to be deposited in pursuance of any Standing Orders, must be returned to the plaintiff. There is no foundation whatever for a claim to retain that, which was paid for a specific purpose, and the concern abandoned before the money could be applied for that specific purpose. But we think that the *remainder* of the money may be also claimed back, and that the language of *Littledale, J.*, and *Holroyd, J.*, in *Nockells v. Crosby*, applies to this part of the case. To use the language of *Holroyd, J.*, in that case, "the concern was never really set agoing; and the expenses incurred in setting a scheme on foot are not to be paid out of the concern, unless they are adopted when it is in actual operation. All the steps taken were only preparatory to carrying the project into effect; and, as it never was carried into effect, the plaintiff was entitled to have back the whole or the money she advanced."

On these grounds, we think that the verdict ought to be entered for the defendant on the first count, but that the verdict for the plaintiff on the count for money had and received ought to stand.

Our judgment therefore must be for the plaintiff.

Rule discharged.

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[*The three following cases are inserted here, though decided at later periods, as also relating to the subject of railway liabilities.*]

REYNELL v. LEWIS.

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WYLD v. HOPKINS (a).

THE case of *Reynell v. Lewis* was an action of debt for £1000, due to the plaintiff from the defendant, for and in respect of the plaintiff having, and who had, for the defendant and at his request, before that time caused divers advertisements, statements, and matters to be inserted and published in divers newspapers and other publications, and which were accordingly inserted and published therein; and also for work and labour, care, diligence, and attendance by the plaintiff, at the defendant's request, before then done, performed, and given, in and about inserting, and causing to be inserted, in divers newspapers and other pub-

The mere fact of a person agreeing to become a member of the provisional committee of an intended railway company, amounts to no more than a promise that he will act with other persons, appointed or to be appointed, for the purpose of carrying the scheme into effect. There-

fore, in an action against a provisional committee-man for goods supplied on the order of the solicitor of the company, it was held that the law would not imply, from the mere fact of his agreeing to be a member of such committee, an authority from him to the other members of it to make contracts by himself or by the solicitor, nor an authority to the solicitor to make them on behalf of the committee.

If the party not only consents to be a provisional committee-man, but authorises his name to be inserted and published in a prospectus, which merely states the names of the members of the provisional committee, and nothing more, that fact does not alter the liability. If it state the names of an acting or managing committee also, it is a question for the jury to say, whether it means that the latter are to take upon themselves the whole management of the concern, or that the former have constituted the latter their agents to manage it on their behalf, in which case the former would be liable for the contracts of the latter. Or, if the solicitor's name were mentioned in it, the question for the jury would be, whether it meant that he was to be employed by those of the committee who acted, or that he was already appointed by all whose names were mentioned, as their solicitor, to do all solicitor's work on their behalf; and further, what was the business then usually transacted by solicitors, in such undertakings, on behalf of the company. And the same as to the secretary.

Where there is also evidence that the defendant has *acted* with relation to the proposed scheme, it is a question for the jury, whether, by his consent and acts, he has authorised the solicitor, or secretary, or any member of the committee, to pledge his credit for the necessary and ordinary expenses to be incurred in forming such a company; and if so, whether the work was done, and the credit given, on the faith of his being liable.

Such an intended association does not constitute a partnership, inasmuch as it constitutes no agreement to share in profit or loss.

(a) These two cases are reported together, as they were argued and decided in that form.

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lications, divers advertisements, statements, and paragraphs for the defendant, and for commission and reward due and of right payable from the defendant to the plaintiff, in respect thereof. There were also counts for money paid, and on an account stated.

Pleas: 1. *nunquam indebitatus*, and issue thereon; 2. payment in satisfaction before action brought. This plea became immaterial.

At the trial, before *Pollock*, C. B., at the sittings in Middlesex after Trinity Term last, it appeared that the plaintiff was an advertising agent, and the defendant one of the provisional committee of the "Central Kent Railway Company." The action was for charges incurred in advertising in certain newspapers, between 13th September and 29th November, 1845. It was proved that, on the 26th September, 1845, the defendant called at the place of business of Parkes, Smith, & Co., solicitors, and saw Joseph Parkes, a clerk employed in the business of that company. The defendant said, that a mutual friend had solicited him to become a member of the provisional committee, and that he called in consequence, to know who were expected to become members. Certain names being given to him, he said they were unobjectionable, and that he would be a member also. He inquired about the line, and having seen a prospectus and map, went away, leaving a card of his address, and description as a committee-man of some other company. On the 1st October, the company was provisionally registered under 7 & 8 Vict. c. 110. A prospectus, issued early in that month, contained the defendant's name, but incorrectly stated; and he called at the company's office, and desired that the error might be amended. He was afterwards seen there several times with the prospectuses in his hand, and talked on the affairs of the line, but never attended any meeting. On the 15th October, a circular letter was sent to him from the company's office, stating that the provisional committee had resolved on allotting 150 shares to

each committee-man, and asking how many he would take. On the 16th October he answered by letter, saying he would take the 150. Once he complained that his name had been inserted in some provisional committees of other lines without his authority. On the 6th November, he advertised in the "Times" newspaper that he had consented to join the provisional committee of a railway in only two instances, the Middlesex and Surrey Junction, and the Central Kent. Early in December, the defendant spoke to Joseph Parkes, in terms of anxiety, about what was going on in the market; and said his own opinion was, that the best course was to do nothing. He asked the secretary what expense had been incurred; and being told the amount, said it was creditable to the solicitors that it was so small. No managing committee, or committee of allotment, appeared to have been formed; nor were any shares ever allotted, or deposits made. Parkes, Smith, & Co., the solicitors to the company, had employed the plaintiff, and his charges were shewn to be reasonable.

The Lord Chief Baron, on the first issue, directed the jury to consider whether the defendant had become a provisional committee-man; and if he had, whether, by taking on him that character, and afterwards acting in the affairs of the company as he had done, he had authorised the solicitor or secretary, or any member of the committee, to hold him out to the world as personally responsible for the reasonable and necessary expenses incurred in forming such a company, and on its behalf; and if it was, then whether the work was done, and the credit given, on the faith of his being so personally responsible. The jury found a verdict for the plaintiff, for so much of his claim as accrued subsequently to September.

*Wyld v. Hopkins* was an action of indebitatus assumpsit for goods sold and delivered, work and labour and materials, and on an account stated.

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Pleas: 1. non assumpit, and issue thereon; 2. payment before action brought. This plea became immaterial.

At the trial, before *Pollock*, C. B., at the London Sit-tings after Trinity Term, it appeared that the plaintiff was a map-seller and engraver, and the defendant a member of the provisional committee of the "Peterborough and Nottingham Junction Railway Company." The action was brought to recover for maps, plans, and sections of the proposed line, engraved and printed, &c. by order of one Gridley, on 4th September, 1845. The company was provisionally registered under 7 & 8 Vict. c. 110; and on the 29th of September, a printed prospectus appeared, stating that the acting engineer of the company had carefully surveyed the line, and that the provisional committee considered its merits to be such as would induce them to apply with confidence to Parliament in the next session for an act to incorporate the company. In this prospectus the defendant's name, with others, was printed under the heading of "Provisional Committee." Several other names appeared in it, under the heading "Managing Directors:" the defendant's was not one of them. Under the head "Solicitors" were the names of Walker and Gridley, who wrote the following letter to the defendant:—"Peterborough and Nottingham Junction Railway Company's Office, 5, Southampton-street, Bloomsbury-square, London, October 8, 1845. Sir, — We have the honour, by desire of the managing directors, to inform you that it has been resolved to give to each member of the provisional committee the option of taking 100 or any less number of shares in this undertaking, provided such option is made known to us in writing on or before Tuesday next, the 19th instant; and in case of default, the shares will be otherwise applied." On 10th October, the defendant answered the above thus:—"Gentlemen,—Have the kindness to allot me the full number (100 shares) allowed to the provisional committee." Early in November, Gridley, the solicitor, ordered the maps, &c.,

the subject of the action. The managing directors often met. The defendant never attended their meetings, nor acted in any way in the company's affairs. The company finally wound up its affairs without going to Parliament.

The correctness of the plaintiff's account was admitted, and also his employment by Gridley. The jury, under the direction of the Lord Chief Baron, found a verdict for the plaintiff for the whole amount claimed.

In *Reynell v. Lewis*, the *Attorney-General*, (Sir John Jervis) on a former day in this term (Nov. 4) obtained a rule for a new trial, on the ground of misdirection, and also that the verdict was against the evidence.

In *Wyld v. Hopkins*, a like rule was granted (Nov. 7) to *Watson*, on the ground that there was no evidence to go to the jury.

*Knowles*, *Crompton*, and *Willes*, shewed cause in *Reynell v. Lewis* (Nov. 20).—On moving for this rule, it was said that the Lord Chief Baron should have asked the jury, in terms, with whom was the contract for inserting the advertisements made. His Lordship considered that form of putting the question inconvenient, as leading to ambiguity; for if made with A. in point of fact, it might in point of law be made with him only, or with him and others; and the direction to the jury was correct. Besides, he several times directed the jury to consider what was the order given; and, if given, whether the parties had acted on it; adding that, *prima facie*, the contract was made with the party giving the order, and the credit given to him, if it was not otherwise shewn. The jury thought that the solicitors of the company could not be taken to have contracted on their own account, but that respondeat superior: but no objection was made at the trial, or on

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moving for the rule, on this ground. Though others may be liable as well as the defendant, he cannot on that account resist the plaintiff's claim, but may sue the other provisional men for contribution. Here there was no managing or other than the provisional committee. The facts justify the verdict, if the question is one of fact; and if it be one of law only, the Judge was bound on the evidence to direct the jury that the defendant was liable. [*Parke, B.*—A provisional committee-man is a person agreeing to be on the committee, to carry into effect provisional arrangements.] Stat. 7 & 8 Vict. c. 110 (*a*) mentions promoters of companies, but not provisional committee-men. Though they are not partners with the subscribers till after the act for incorporation is obtained, they are so far partners with each other for carrying out their scheme to that point, as to be liable for expenses provisionally incurred for that object. [*Parke, B.*—On the 26th Sept., 1845, was any such liability as this supposed to exist on the part of a provisional committee-man? We must keep sight of the usage or state of things as existing at the time when the defendant agreed to assume that character. The defendant never attended any meeting. Supposing he had attended, and that six had voted for giving the order to the plaintiff, and five the other way, could the five be made liable?] *Barnett v. Lambert* (*b*) seems decisive of this case. There the plaintiff sued the defendant for the price of stationery. The defendant had consented to be a provisional committee-man, and had once acted as chairman. The Court held the Judge right in directing the jury that it might be inferred that the defendant, by consenting to join the provisional committee, had made the secretary his agent to enable the company to proceed. The evidence of the defendant's acts in this case is stronger. [*Parke, B.*—Did the defendant re-

(*a*) Sections 2 to 6 inclusive.

(*b*) Ante, 489.

present to the plaintiff that the solicitor had authority from him, the defendant, to bind him, and did the plaintiff act on that authority? There was no proof to whom the plaintiff's bill for advertisements was made out, or whether any such bill was made out at all.]

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The *Attorney-General* and *Cowling*, in support of the rule, (Nov. 21).—It has never yet been judicially determined what is the nature of the liability of a provisional committee-man of a railway company, merely as such. In the case of *Barnett v. Lambert*, the defendant, besides being a provisional committee-man, had done acts which shewed a knowledge on his part of his liability. In many subsequent cases which occurred at Nisi Prius, the defendants did not contest their liability. So the course of decisions proceeded, until the occurrence of the case of *Low v. Wilson* (a); when it was seen that the real question was, not *to whom credit was given*, but *with whom the contract was made*. In the present case, *primâ facie* the contract was undoubtedly made with Parkes, Smith, & Co.; but if it was made by them as the agents of another, no doubt that principal is liable; and no doubt, also, the authority may be implied from circumstances. But it is contended that it cannot be implied merely from the circumstance of the defendant's being a provisional committee-man. Such being the true doctrine applicable to the case, the direction of the Lord Chief Baron to the jury cannot be supported. Upon that direction, the jury would have found against the defendant, *to whomsoever* the authority was given by him: whereas the question really was, whether he had authorised the *solicitors* to make this contract on his behalf. If I authorise A. to give an order, B. cannot do it, and charge me, merely because it is for my benefit. Besides, the implied authority can surely be only that each officer of the company shall do

(a) Cor. *Parke*, B., sittings in Trinity Term, 1846.



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*his own proper business.* Could it be said that the defendant would be liable for advertisements inserted on the order of the *engineer*? The real question is, however, with whom was the contract made? This is not a *partnership*: it is obvious that one of the committee-men could not of his own authority have ordered these advertisements, and thereby charged the others. Suppose it were carried by a majority of six to five that the plaintiff should be employed; are all the minority liable? It is, in truth, an ordinary case of principal and agent, without the legal incidents of an ordinary partnership. There can be no ground whatever to call these persons partners. They are probably unknown to each other; they come in and go out independently of each other. Is the liability of a provisional committee-man matter of law, or of fact? If of law, the learned Judge should have told the jury what the law was; if of fact, the jury were not asked to consider what are his duties, or what acts he does in that character; so that it was left to the jury that he is liable because he is a provisional committee-man, without their being informed what that is. In truth, when parties become members of a provisional committee, they mean merely this—that if the project be brought into such a shape as that it may be prosecuted, they are a body of persons who are willing to shew their confidence in the scheme, and from whom a committee of management may be selected. They announce themselves merely as *patrons* of the line. Suppose an order were given by the solicitor to advertise for a month; then one provisional committee-man comes in; then there is a further order to advertise for another month; then two more come in, and so on: is the solicitor liable for the first order, the one committee-man for the second, the three for the third, and so on? [*Parke, B.*—The question is, whether the defendant has authorised, expressly or impliedly, this particular contract. If the parties giving the order *represent themselves* as agents, still there comes the further question,

whether in fact the defendant *did* authorise them.] There are frequently *local* committee-men for a particular district; what is the extent of *their* liability? In reality, it is to the *deposits*, which will form a fund to cover preliminary expenses, that the credit is given in these cases. The prospectus in this case does not hold the committee-men out as partners, nor as taking upon themselves any pecuniary responsibility. With respect to the statute, the 7 & 8 Vict. c. 110, that does not affect the question. It merely requires that all *promoters* shall be registered, and does not even mention provisional committee-men. But if they be promoters, how are they therefore liable to this extent, or what implied authority would they give to the solicitor, or to a co-promoter? There is nothing in the statute to shew that promoters are in the nature of co-contractors.

Cur. adv. vult.

In *Wyld v. Hopkins*, cause was shewn against the rule (Nov. 23 and 24), by *Martin* and *Willes*, who contended, first, that if a man consents to be a provisional committee-man, or a director, of a railway company, that fact either involves him, in point of law, in responsibility for necessary expenses, or at all events justifies a Judge in stating it as a *præsumptio juris et facti* in favour of his liability: that a provisional committee-man means a man who allows himself to be one of the managers of the concern provisionally, until the act of Parliament is obtained, and directors appointed thereby; and so holds himself out to the world as a party liable for the necessary expenses of the concern: that, further, a provisional committee-man, who allows his name to be published as such in a prospectus, is a *promoter* within the meaning of the 7 & 8 Vict. c. 110, and as such liable: that this is really a species of limited partnership, being an association to carry out a common object, and no funds in hand being provided for that purpose; and that in such case the

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parties make each other their agents to bind them for necessities. *Barnett v. Lambert* (a), *Holmes v. Higgins* (b), *Walstab v. Spottiswoode* (c), and *Monypenny v. Hartland* (d), were cited and relied on.

*Watson* and *Petersdorff*, in support of the rule, urged similar arguments to those employed for the defendant in *Reynell v. Lewis*; and argued that this was no more in the nature of a *partnership*, than was an association for the purpose of building a hospital or a church, or for any political purpose, or than an ordinary club: and that the term "provisional committee-man" had no *legal* meaning, any more than the term "consulting council," in the case of *Wood v. The Duke of Argyll* (e).

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—We have considered the two cases which were argued before us, of *Reynell v. Lewis* and of *Wyld v. Hopkins*, and give our judgment in those only; but we think it right to state fully the principles on which our judgment proceeds.

The question, in all cases in which the plaintiff seeks to fix the defendant with liability upon a contract express or implied, is whether such contract was made by the defendant, by himself or his agent, with the plaintiff or his agent, and this is a question of fact for the decision of the jury upon the evidence before them.

The plaintiff, on whom the burden of proof lies in all these cases, must, in order to recover against the defendant, shew that he (the defendant) contracted expressly or im-

(a) Ante, 489.

(b) 1 B. & Cr. 74.

(c) Ante; 501.

(d) 1 C. & P. 352.

(e) 6 Man. & G. 928; 7 Scott, N. R., 885.

pliedly; expressly, by making a contract with the plaintiff, impliedly, by giving an order to him under such circumstances as shew that it was not to be gratuitously executed: and if the contract was not made by the defendant personally, it must be proved that it was made by an agent of the defendant properly authorised, and that it was made as his contract. In these cases of actions against provisional committee-men of railways, it often happens that the contract is made by a third person; and the point to be decided is, whether that third person was an agent for the defendant for the purpose of making it, and made the contract as such. The agency may be constituted by an express limited authority to make such a contract, or a larger authority to make all falling within the class or description to which it belongs, or a general authority to make any; or it may be proved by shewing that such a relation existed between the parties as by law would create the authority; as for instance, that of partners, by which relation, when complete, one becomes by law the agent of the other for all purposes necessary for carrying on their particular partnership, whether general or special, or usually belonging to it; or the relation of husband and wife, in which the law, under certain circumstances, considers the husband to make his wife an agent. In all these cases, if the agent, in making the contract, acts on that authority, the principal is bound by the contract, and the agent's contract is his contract, but not otherwise. This agency may be created by the immediate act of the party, that is, by really giving the authority to the agent, or representing to him that he is to have it, or by constituting that relation to which the law attaches agency; or it may be created by the representation of the defendant to the plaintiff, that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such; and if the plaintiff really makes the contract on the faith of the defendant's representation, the defendant is bound; he is estopped from dis-

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puting the truth of it with respect to that contract; and the representation of an authority is, quoad hoc, precisely the same as a real authority given by the defendant to the supposed agent. This representation may be made directly to the plaintiff, or made publicly so that it may be inferred to have reached him, and may be made by words or conduct. Upon none of these propositions is there, we apprehend, the slightest doubt; and the proper decision of all these questions depends upon the proper application of these principles to the facts of each case, and the jury are to apply the rule with due assistance from the judge.

There are few, if any, of these cases, in which it is contended that authority was directly given by the defendant to the party making the contract to make it for the defendant. Rarely has that circumstance been proved by direct testimony. In one case, it was said that it was to be inferred from a conversation, in which the defendant expressed his satisfaction that the expenses were moderate. That was evidence of the fact for the consideration of the jury, entitled to more or less weight according to the other circumstances of the case. But it is contended (and that formed the chief part of Mr. *Martin's* argument, and a part of that of others) that the relation of co-provisional committee-men constituted an association of quasi co-partnership, in which one was agent for the other, for the purposes of all preliminary proceedings necessary to enable them to obtain an act; or that the fact of their being co-promoters of the scheme, coupled with the fact that no money was supplied for the expenses of it, was evidence to go to a jury that each authorised the other to contract for these purposes, on his behalf, and that of the other promoters. It was insisted, that where there was no other evidence than the mere fact of the defendant having already agreed to be a provisional committee-man, there was a sufficient case, or at least a case for the consideration of the jury, to prove an authority

given by the defendant to every other committee-man to give the order out of which the contract arose, by himself, or by the solicitor or secretary, or an authority to such solicitor or secretary to give it on behalf of the committee. We think that no such consequence follows as matter at law, from the mere fact of the defendant agreeing to be a provisional committee-man. Such an agreement amounts to no more than a promise that he would act with other persons appointed, or to be appointed, for the purpose of carrying some particular scheme into effect. The term "committee" means an individual or a body to which others have committed or delegated a particular duty, or who have taken on themselves to perform it in the expectation of their act being confirmed by the body they profess to represent or act for; an agreement to become one of the committee-men is an agreement to become one of that body. The schemes may be various—to establish an hospital, or place of emigration, to which persons are to subscribe merely for charitable motives, or partly from these motives, partly from others; or a proprietary school, or literary institution, or assembly-room, in which they are to be beneficially interested as shareholders; or to obtain an act for a bridge, drainage, railway, or canal; but whatever the object may be, it seems to us to make little or no difference in the position of the person agreeing to act as a committee-man. If the object of some, most, or all, is gain to themselves individually, the legal consequence is the same as if the object of the parties were the most charitable and benevolent, though the result may be practically very different, in exciting an improper prejudice in the minds of a jury when the evidence is laid before them for their consideration. Such an intended association constitutes no agreement to share in profit or loss, which is the characteristic of a partnership. It would be absurd to suppose that such a relation could be meant to be created by any of those who consented to act. Could it be imagined that a person would agree to be a

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partner, not only with those who were then named committee-men, but any that should afterwards be named by themselves or by the projectors of the company; and could those who subsequently agreed to become members, suppose that those previously named could ever have so intended? The truth is, the agreement to become a provisional committee-man means neither more nor less than what the words express: viz., an agreement to act on the provisional committee, in carrying into effect the preliminary arrangements for petitioning Parliament for a bill, and so to promote the scheme. If afterwards the provisional committee-man does act, he is responsible for his acts. But there are other cases in which the question does not assume so simple a form, and where there is evidence that the defendant has not only consented to be a provisional committee-man, but has authorised his name to be inserted in a prospectus, not generally, but a particular prospectus, in which, in some cases, certain persons are described as the acting committee; in others solicitors are named, or engineers, or a secretary. If such prospectus has been so publicly circulated, with the defendant's consent, that the jury would presume that plaintiff knew of it, or if the plaintiff has had it shewn to him at or before the time of making the contract, and has in either case acted upon it in making the contract, the question is, what inference ought a reasonable man to draw from the contents of that paper? This must of course depend upon the terms of each particular prospectus. If the prospectus state merely the names of the provisional committee, and nothing more, and no light be derived from the context, that circumstance does not alter the liability of the defendant. If not responsible as being one of that committee in fact, he cannot become so by the representation of the fact. If it states the names of the acting committee also, where that has been appointed, is the meaning that the acting committee is to take the whole management to the exclusion of the provisional committee, their provisional charac-

ter having ceased; in which case the provisional committee would not be liable: or does it mean that the provisional committee-men have appointed the acting committee, or the majority of it, on their behalf and as their agents; in which case they would be liable for the contracts of the acting committee, or the majority, made as such agents? Again, does it mean, where the solicitor's name is mentioned, that such person shall be regularly employed in that character by those of the committee who acted, or that he was already appointed by all whose names are mentioned, as their solicitor, to do all solicitor's business on their behalf? And then would arise a further question, what was the business, at the time of the contract, usually transacted by solicitors for companies intending to obtain an act of Parliament, and on behalf of the company?—which is a question of fact, to be proved by evidence. The same remark applies to the appointment of secretary. Applying these observations to the two particular cases before us, we think that in that of *Reynell v. Lewis*, there was some evidence to go to the jury of the employment of the plaintiff, and that there was no misdirection; but we think we ought to grant a new trial, on payment of costs, in order that it may be submitted to another jury, and fully considered by them upon the principles laid down above. In the other case, *Wyld v. Hopkins*, we entertain so much doubt whether there was any evidence at all to go to the jury, that we think there ought to be a new trial generally, without the condition of the payment of costs.

Rules absolute accordingly.

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A. and B. were the registered promoters, under the stat. 7 & 8 Vict. c. 110, of a railway company. A provisional committee was afterwards formed, at a meeting of which A. was appointed secretary, and B. solicitor, to the company, and other persons a managing committee:—  
*Held*, that A. could not, merely upon these facts, recover against an acting member of the managing committee for services afterwards performed by him as secretary.

## WILSON v. Viscount CURZON.

**ASSUMPSIT** for salary and wages, and on an account stated. Plea, non assumpsit.

At the trial, before *Pollock*, C. B., at the sittings in Middlesex after Michaelmas Term, 1846, it appeared that this action was brought to recover the sum of £125, the amount of six months' salary alleged to be due to the plaintiff, from September, 1845, to March, 1846, for his services as the services to a projected company called "The Canterbury and Herne Bay Railway Company," of the provisional and managing committee of which the defendant was a member. The Company had been provisionally registered, under the stat. 7 & 8 Vict. c. 110, with the names of the plaintiff and Daniel Keene as the promoters. In support of the plaintiff's case, two extracts from the books of the Company were put in evidence:—

"At a meeting at the Guildhall Coffee House, Oct. 15, 1845.

Present.

[Here followed the names of several members of the provisional committee, not including the defendant's.]

"The following resolutions were proposed by —, and seconded by —, and agreed to unanimously:—

[Amongst them were the following:]

"4. That Daniel Keene, Esq., be appointed solicitor to the Company.

"5. That James Wilson, Esq., be appointed secretary to the Company.

"6. That — be engineers and surveyors to the Company, and be instructed to proceed in the survey.

"That the following gentlemen be appointed as an acting or managing committee or directory: [Here followed several names, including that of the defendant]: with power to add to their number."

This entry was signed by all the members present, and by the plaintiff as secretary.

The other extract purported to be the minutes of another meeting of the provisional committee, held at the same place, on the 17th of October, at which the defendant presided as chairman. It was stated, that the minutes of the former meeting were read by the secretary, and confirmed; and the book was signed by all the members present, including the defendant, and by the plaintiff as secretary.

It was proved also, that the plaintiff's salary, after the rate of £250 per annum, had been audited and passed at a subsequent meeting of the managing committee.

For the defendant it was contended, that there was no evidence to go to the jury of any contract whereby the defendant became personally liable to the plaintiff; and that the plaintiff, who was one of the registered promoters and original projectors of the undertaking, could not bring an action against any member of the provisional committee for services performed by him in doing things incidental to the formation of the Company. The Lord Chief Baron was of that opinion, and directed a nonsuit, but gave the plaintiff leave to move to enter a verdict for the account claimed, or any less sum, as the Court might direct.

The *Attorney-General* (Sir John Jervis) now moved accordingly, or for a new trial, on the ground of misdirection. The plaintiff was entitled to recover in this action, for there was evidence of an express contract on the part of the committee, of whom the defendant was one, to employ him in the character of secretary, and to pay him a salary for his services. It is clear that, if the plaintiff were not a promoter of this Company, the fact of his appointment and employment would be evidence to charge the defendant; for the natural presumption is, that the man who does work for another is to be paid for it. Then, how does the fact of his being a registered promoter of

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defendant meant to contract as a principal, independently of his acts as a provisional committee-man of the Company. On the facts in evidence in this case no such intention appears. There is not a word in the resolution about payment of the plaintiff; and we all know that in fact it was the intention of all parties that these payments should be made out of the subscriptions which were expected to come in. It is sufficient to say, however, that when it appears that the plaintiff was a promoter of the Company, there was no sufficient evidence to go to the jury of a personal contract with the defendant.

ALDERSON, B.—I also think there should be no rule in this case. When the fact appears that the plaintiff was a promoter of the Company, the solicitor a promoter, and the defendant chairman of a meeting of the promoters, at which meeting the plaintiff is appointed secretary, the other original promoter solicitor, and other persons a managing committee, it comes to this, that it is an appointment of the plaintiff by himself; and if he is to be paid at all, which I doubt, he must therefore pay himself. It is the case of *Holmes v. Higgins* over again.

POLLOCK, C. B., and PLATT, B., concurred.

Rule refused.

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## MENGENS v. PERRY (a).

IN this case, the defendant, on the 29th of November last, obtained an order for five days' time to plead; and on the same day took out a summons for the delivery of particulars of the plaintiff's demand, returnable on the 1st of December. This summons, having been adjourned by consent until three o'clock in the afternoon of the 4th, was heard at half-past six o'clock in the evening of that day, and dismissed. On the 5th, at one o'clock, the plaintiff signed interlocutory judgment. A summons was taken out to set aside this judgment for irregularity, on the ground that the defendant was entitled to the same time for pleading after the summons for particulars was disposed of, as he had at the time when it was returnable; and *Alderson*, B., being of that opinion, ordered it to be set aside.

Where a defendant, having obtained an order for time to plead, takes out a summons for particulars, which is dismissed after the expiration of the time given for pleading, he is entitled only to the remainder of the same day for pleading.

On a former day in this term, *Peacock* obtained a rule, calling upon the defendant to shew cause why the order of the learned Judge should not be rescinded; citing *Hughes v. Walden* (b), *Vernon v. Hodgins* (c), and Reg. Gen., H. T., 2 Will. 4, s. 48 (d).

*Moseley* shewed cause.—This judgment was irregularly signed; for the summons for particulars was a stay of proceedings from the day on which it was returnable until it was discharged: *Whitehead v. Shaw* (e), *Calze v. Lord*

(a) This case was decided on the last day of Hilary Term (Jan. 31), and was accidentally omitted in its order.

(b) 5 B. & C. 770, n.

(c) 1 M. & W. 151.

(d) "A defendant shall be allowed the same time for pleading after the delivery of particulars

under a judge's order, which he had at the return of the summons; nevertheless, judgment shall not be signed till the afternoon of the day after the delivery of the particulars, unless otherwise ordered by the judge."

(e) Barnes, 180.

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*Lyttelton (a), Roberts v. Cuthill (b).* Here, therefore, the time for pleading ceased to run from the time when the summons was returnable until it was dismissed, and the defendant consequently had until the 8th of December to plead. But even taking it that, according to *Hughes v. Walden*, he was entitled only to a *reasonable* time for that purpose after the summons was dismissed, it cannot be considered that, in this case, where it was dismissed at so late an hour as half-past six o'clock, the remainder of that day was a reasonable time to prepare the pleas.

*Peacock*, in support of the rule, was not called upon.

POLLOCK, C.B.—The rule laid down in *Hughes v. Walden*, and recognised and acted upon in *Vernon v. Hodgins*, is, that the defendant is not entitled to more time for pleading than the rest of the day on which the summons is dismissed. If, under the particular circumstances of the case, that is not a reasonable time, he ought to apply for further time at the hearing of the summons.

PARKE, B.—I am of the same opinion. I consider this point to be quite settled by the cases. In *Hughes v. Walden*, Lord *Tenterdon* laid it down, that, where an application is made which the result shews to have been wrongly made, the other party must wait till it is disposed of, and then the party making the application has only a reasonable time for taking the next step; and that, for this purpose, the whole of the day in which the application is disposed of is a reasonable time. That case was confirmed in *Vernon v. Hodgins*. Here the dismissal of the summons shews that the application for particulars was wrong, and those cases are therefore directly in point.

ALDERSON, B.—I quite agree. I did not advert to the

(a) 2 W. Bla. 954.

(b) 4 Dowl. P. C. 204.

distinction between the case of a summons dismissed, and that of a summons granted. If the defendant had got his order for particulars, then he would have had the same time for pleading after they were delivered as he had at the return of the summons. The mistake being mine, the defendant will be saved the costs of this rule.

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Rule absolute, without costs.

PRICE v. RICHARDSON.

May 22.

**ASSUMPSIT** on a guarantee. The declaration stated, that, in consideration that the plaintiff would sell and deliver to one Thomas Lewis £5 or £10 worth of leather, the defendant promised to see the plaintiff paid for the same on the 6th December, 1843, for the said Thomas Lewis. The declaration then averred the sale and delivery by the plaintiff to Thomas Lewis of £10 worth of leather, and alleged as a breach, that the defendant did not see the plaintiff paid for the same. Plea, non assumpsit.

*Held*, that no consideration appeared on the face of the following guarantee:—"1843, June 28. Mr. Price; I will see you paid for £5 or £10 worth of leather, on the 6th of December, for Thomas Lewis, shoemaker."

At the trial, before the under-sheriff of the county of Brecon, the plaintiff having proved a guarantee signed by the defendant, in the following terms:—

"1843, June 28th. Mr. Price,—I will see you paid for £5 or £10 worth of leather, on the 6th of December, for Thomas Lewis, shoemaker;"—

it was objected for the defendant that it did not disclose any consideration on the face of it. The under-sheriff directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit, if the Court should be of that opinion.

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*E. V. Williams*, in Easter Term, obtained a rule nisi accordingly. Against which,

*Cowling* now shewed cause.—The question is, whether it sufficiently appears on the face of this guarantee, that it was given for leather to be supplied subsequently to the execution of it; and it is submitted that it does. If it had been for goods already supplied, the amount would have been specifically mentioned, not left at large as it is, and the promise would have to pay the sum already due. *Kennaway v. Treleavan* (a) is in point. There the guarantee was in these terms:—"I hereby guarantee to you, Messrs. K. and Co., the sum of £250, in case Mr. P., of &c., should default in his capacity of agent and traveller to you." This Court held, that a sufficient consideration appeared on the face of the instrument; namely, the *future* employment of P. as agent and traveller of the plaintiffs. *Bastow v. Bennett* (b) is also an authority for the plaintiff.

*E. V. Williams*, contra, was stopped by the Court.

PARKE, B.—It is impossible to collect from the terms of this guarantee what was the real consideration for the defendant's promise. Three considerations might be suggested, and it would be mere conjecture which was the one intended by the parties. It is fully established, according to the rule laid down in *Wain v. Warlters* (c), that the consideration ought to appear on the face of the instrument.

ALDERSON, B.—It is clear that a consideration, either in express words or arising by necessary implication, must appear on the face of the instrument. Here the declaration states the future supply of goods as the consideration; but that does not appear, either expressly or by necessary implication, on the face of the guarantee.

(a) 5 M. & W. 498.      (b) 3 Campb. 220.      (c) 5 East, 10.

ROLFE, B.—This guarantee looks very like an engagement on the part of the defendant to pay the plaintiff money owing to him by Lewis, if he would forbear to sue Lewis for it.

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PLATT, B., concurred.

Rule absolute.

LAW v. THOMPSON.

May 29.

ASSUMPSIT for work and labour, money paid, and on an account stated. Pleas, non assumpsit, the Statute of Limitations, and a set-off. Issues thereon.

At the trial, before *Pollock*, C. B., at the London Sitings after Hilary Term last, it appeared that the plaintiff had delivered two sets of particulars in the action. In the first of them he claimed "the sum of £450 for his services as clerk or manager to the defendant, from August, 1837, to October, 1839, inclusive." In the second, he claimed the same sum for the same period, adding, "after the rate of £200 per annum." This action was commenced in April, 1845. A witness called on the part of the defendant proved that the plaintiff was not his clerk or manager, but that the defendant had agreed to give him a commission of one-half per cent. on all the business which he should introduce to him by means of his employment as manager of the Manchester Bank. It was thereupon contended for the defendant, that there was a variance between the contract alleged and that proved, and that the plaintiff must be nonsuited. The learned Judge, however, declined to nonsuit, and left the case to the jury, who found a verdict for the plaintiff, damages £100, the defendant having leave reserved to him to move to enter a nonsuit.

The plaintiff's particulars of demand claimed "the sum of £450, for his services as clerk or manager to the defendant, from August, 1837, to October, 1839, inclusive, after the rate of £200 per annum." The proof was of an agreement by the defendant that the plaintiff, who was the manager of a banking company, should have a certain per centage by way of commission on all business he should introduce to the defendant:—*Held*, that the particulars were not sufficient to let in such a demand, and that the defendant was in strictness entitled to a nonsuit.



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*Jervis* having obtained a rule accordingly,

*J. Brown* (with whom was *Humfrey*) now shewed cause. —The real question is, whether the defendant has been misled by these particulars. Now in fact there was but one set of services performed by the plaintiff for the defendant, who therefore must have known that the action was brought in respect of them. He has not laid before the Court any affidavit shewing that he was misled, as he ought, under such circumstances, to have done: *Hurst v. Wathis* (a), *Day v. Bower* (b). There was a case of *Mayher v. Ward* (c) recently before the Court of Queen's Bench, which appears to be a direct authority for the defendant. *Lambirth v. Roff* (d) is also in point. There the plaintiffs, who were spirit merchants and brewers, and who were suing for spirits sold to the defendant, inadvertently delivered a bill of particulars for goods sold to the defendant in their trade of *brewers*. The Court, in the absence of anything to shew that the defendant had been misled thereby, refused to enter a nonsuit. [*Alderson, B.*—There the persons composing the firm of spirit merchants and that of brewers were different persons. *Lambirth* and *Porter*, the plaintiffs in the action, were the spirit merchants, but the brewers were *Lambirth* and *Inglis*. The defendant, therefore, could not be deceived or misled by the particulars. Here the particulars substantially say that the plaintiff is going for a particular salary, and nothing else.] At all events, the Court will allow the plaintiff to have a new trial on payment of costs, with liberty to amend his particulars. [To this the Court assented.]

*Jervis* and *Crompton*, in support of the rule.—This is

(a) 1 Campb. 68.

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(b) Id. 69, n.

(d) 8 Bing. 411; 1 M. &

(c) "Law Times," April 4, Scott, 597.

not a case in which the plaintiff ought to receive such indulgence. If the learned Judge had nonsuited, the Court would hardly have granted a new trial, even on payment of costs.

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The cases cited on the other side have no application. In *Mayher v. Ward*, the plaintiff, a surveyor, claimed commission on a given amount, and he was allowed, on failing to establish that case, to prove the value of his services. But the known mode of paying a surveyor is by a commission, and the only question in that case was as to the existence of a *customary* commission. With respect to *Hurst v. Watkis*, the dictum of Lord *Ellenborough* in that case, that, although the plaintiff has given an imperfect particular, he is entitled to a verdict for more, if on the defendant's evidence more appears to be due to him, cannot be supported. It is said the defendant has made no affidavit that he has been misled by the form of the particulars. But in almost every case the defendant perfectly knows the real contract: the test is not, therefore, whether he has in fact been misled; he is entitled to be informed what the plaintiff is proceeding for in the action. The question is, whether the particular is *calculated* to mislead, and the defendant's knowledge of the facts cannot be imported into the consideration of that question. The object of giving particulars is to prevent the defendant from being surprised by having a contract put upon him at variance with the fact. [*Alderson*, B.—The plaintiff might have framed his particulars with a double aspect. *Pollock*, C. B.—Or amended them when he ascertained what his case really was.] As it is, the case he set up at the trial was perfectly different from what the defendant was entitled to expect from the particulars. Where the bill of particulars stated the plaintiff's demand to be for goods sold and delivered to the defendant, he was held not to be entitled to prove under them the sale of goods by the defendant as the plaintiff's agent. *Holland*

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v. *Hopkins* (a). [*Alderson*, B.—That was making a different party to the suit].

POLLOCK, C. B.—If the question in this case were merely whether a nonsuit should be entered, I should have thought the rule must be made absolute; but the question being, whether there should be a new trial on payment of costs by the plaintiff, and the particulars should be amended, I think the rule may be absolute in that form. It appears to me that, at the close of the plaintiff's case, the defendant was entitled to have a nonsuit entered. The claim of the plaintiff, as stated in his particulars, was substantially for *salary* as the clerk or manager of the defendant; the evidence was of a contract for a *commission* to be paid to him: and there is this substantial distinction, that the commission was to be claimed not as a clerk, but the salary only as a clerk. The object of the defendant's evidence was merely to shew that the plaintiff was not a clerk at all, but was only to have a commission on the consignments he could introduce through the medium of the Manchester Bank. The object was to shew a special engagement of him, being the manager of that Bank, for a certain per-centage on business to be introduced by him. There is, therefore, really a substantial distinction: it is not like paying a clerk a per-centage on business done by him as clerk, but an engagement with a person in a different business altogether, for payment of a per-centage on business introduced by him as such. I think it very likely the defendant *was* misled, for I thought at the trial there was not the slightest pretence for the action; and the defendant was very probably misled in this respect, that there being really no claim at all, he had no idea how the claim which the plaintiff set up would be made out, and probably expected that the case proved at the trial would be for salary as a clerk, for which there was no foundation.

(a) 2 Bos. & P. 243.

ALDERSON, B.—I am of the same opinion. No doubt we should be doing very wrong if we allowed minute variances from the particulars to prevail. If they give substantial information of the plaintiff's claim, that is sufficient, although they may vary slightly from the fact, and where, from the nature of the particulars themselves, the defendant is not likely to be misled. But we cannot look to the actual fact of the misleading. That depends upon the acuteness or stupidity of the defendant's attorney, and is therefore no criterion, unless we apply this rule also,—would a reasonable man be likely to be misled by the form of the particulars? The case of *Lambirth v. Roff* is distinguishable from the present, for the reasons I have already mentioned. There the defendant knew which were the wine and spirit merchants, and which were the brewers, and the form of the particulars could not have deceived anybody with his eyes open. It would have been quite a different case if the same parties had constituted both the firms; and I observe that I put my judgment in that case upon this very distinction. The question substantially is, would a reasonable man be deceived by the particulars into a supposition that the plaintiff's demand was different from that which is proved at the trial? Here the particulars state exactly what a man would say who claimed a salary of £200 a year for two years and a quarter; then, at the trial, he claims no such sum, but makes a substantially different demand, requiring a totally different defence. In the one case, the defendant is to shew that he made no bargain for a salary, or made it at a different rate: in the other, he is to shew that none of the business was done in the last six months of the time, which alone is not barred by the Statute of Limitations. Unless the object of particulars be to deceive a defendant, the present particulars are insufficient.

ROLFE, B.—I am of the same opinion. We are always to look and see whether the particulars are calculated to

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mislead. There have been cases where they were directly wrong, and yet it has properly been decided that they were not calculated to mislead; as, where the word "chalk" was used instead of "cork," the Court said it was evidently a mere slip, the word having been heard or copied wrong. So in the case of a wrong date, where it is apparent on the face of the particulars for what the plaintiff is going, the Court will correct them by amending what the defendant must know was a mere clerical error (*a*). So in the case of *Lambirth v. Roff*, the defendant knew perfectly well that the plaintiffs in that action were not going for anything which they claimed as brewers, because he knew *they* were not brewers. But this case stands on a totally different footing. It is impossible not to see that the plaintiff is claiming a salary, although that word does not actually occur in the particulars. If he were going only for the last year, it would be very doubtful whether they were sufficient for that purpose; but, *à multo fortiori*, are they not so where he is going for two years and a quarter, of which only half-a-year is not barred by the Statute of Limitations? He cannot, under these particulars, be allowed to repudiate the claim for salary altogether, and prove that a commission is due to him, upon an entirely different contract. Suppose the defendant had gone to great expense in going through his accounts, to shew that nothing was due for commission, and the plaintiff had abandoned the action, the defendant would not have been entitled, on taxation, to the costs of such examination. Without, therefore, infringing on the general doctrine, that particulars are not to be scanned with the minuteness of special pleading, it seems to me that these particulars were calculated to mislead, and therefore were insufficient.

(*a*) *Millwood v. Walter*, 2 Taunt. 224; *Harrison v. Wood*, 8 Bing. 371; 1 M. & Scott, 536.

PLATT, B.—The declaration in this case is in the general form for work and labour. The plaintiff is then required to give particulars of his demand, and he gives them in this form:—that he claims to recover the sum of £450 “for his services as clerk or manager to the defendant, from August, 1837, to October, 1839;” to which he afterwards adds, “after the rate of £200 per annum.” When I first read these particulars, they seemed to me to amount to this: that the plaintiff claimed £450 as clerk or manager to the defendant, which he estimated at the rate of £200 a year, as the value of his services, not necessarily as a salary; and that the evidence he sought to give under them was only evidence of the value of his services, estimated not as salary, but in a different way, namely, by means of an agreed per-centage on the valuable return which his employer obtained by means of his services. There is, however, much force in the argument of my Brother *Alderson*, that these particulars are calculated to lead the defendant to expect only proof of a claim for a salary for services performed. At first, I certainly had a strong opinion that, substantially, the action was brought generally for a remuneration for services performed, and that the defendant must have known what services were performed for him by the plaintiff, and therefore must have been prepared to meet the case. But I am very much pressed by the argument of my Brother *Alderson*, that the particulars were calculated to mislead a man who did not examine them hypercritically; and upon the whole, therefore, it is safer, perhaps, to hold them insufficient.

Rule absolute for a new trial.

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*June 2.*

An attorney's bill of costs for common law business, delivered under the stat. 6 & 7 Vict. c. 73, must shew in what court the business was done.

ENGLEHEART *v.* MOORE.

**D**EBT for £30, for work and labour, care, diligence, journeys, and attendance done and bestowed by the plaintiff, as the attorney and solicitor of and for the defendant, and on his retainer, in and about the prosecuting, defending, and soliciting of divers causes and suits, and in and about other business for the defendant, at his request, and for certain fees due and of right payable to the plaintiff in respect thereof. There were also counts for money paid, and on an account stated.

Plea, that, before and at the time of the doing and bestowing of all and every part of the said work and labour, care, diligence, journeys, and attendance, as in the first count mentioned, and before and at the time of the becoming due of the said fees in respect thereof, in the said first count mentioned, and before and at the time of the paying of all and every part of the money in the second count mentioned to have been paid, he the plaintiff was, and at the time of the commencement of this suit also was, an attorney of the court of our lady the Queen before the Queen herself at Westminster; and further, that the said work and labour, care, diligence, journeys, and attendance, in the said first count mentioned, were, and every part thereof was, business by the plaintiff done as an attorney; and that the sum of £30, in the said first count mentioned, was and is, and consisted and consists of, fees and charges for the said business so done, and of no other money whatever: and that the said money in the said second count mentioned to have been paid, was, and every part thereof was, so paid by the plaintiff as an attorney, in disbursements for the said business so done, to the amount of the sum in the second count mentioned. And further, that after the making and passing of an act of Parliament

made and passed in the session of Parliament holden in the 6th and 7th years of the reign of our lady the now Queen Victoria, intituled "An Act for consolidating and amending several of the Laws relating to Attornies and Solicitors practising in England and Wales," to wit, on the 25th day of October, A.D. 1844, the plaintiff commenced this action, contrary to the form of the said statute, for the recovery of the said fees, charges, and disbursements, without having, one calendar month before the commencement of this suit, delivered to the defendant, the party charged therewith, or sent by post to, or left for the defendant at his counting-house, office of business, dwelling-house, or last place of abode, a bill of the said fees, charges, and disbursements, or of any or either of them, or of any part thereof, subscribed with the proper hand of the plaintiff, or inclosed in or accompanied by a letter subscribed with the proper hand of the plaintiff, referring to such bill, as was and is required by the statute in such case made and provided. And further, that the said account in the said last count mentioned was, &c. as therein mentioned, stated of and concerning £30, parcel of the said sums of £30 and £30 in the said first two counts respectively mentioned, after the sum of £30, parcel as aforesaid, was found to be due and in arrear from the defendant to the plaintiff, on stating of the said account, and which said sum of £30, parcel as aforesaid, was and is the sum of £30 in the said last count mentioned.—Verification.

Replication, that the plaintiff did, one calendar month before the commencement of this suit, to wit, on &c., send by post to the said defendant at his then place of abode, a bill of the said fees and disbursements, amounting &c., inclosed in a letter, subscribed with the proper hand of the said plaintiff, referring to such bill, according to the form of the statute in such case made and provided; concluding to the country; and issue thereon.

At the trial, before *Pollock*, C. B., at the London sittings

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after Hilary Term, the plaintiff proved the delivery to the defendant, a calendar month before the commencement of the action, of a bill which was signed by the plaintiff, but did not shew in what court the business, or any part of it, was done. It was headed thus:—"To W. H. Engleheart. Yourself at the suit of Perry;" and set out the items of business done, from several of which it appeared that the suit referred to was an action at law. It was objected for the defendant, that this was not a sufficient bill according to the stat. 6 & 7 Vict. c. 73, s. 23. The learned Judge reserved the point, and a verdict was found for the plaintiff for the amount of the bill, with liberty to the defendant to move to enter a nonsuit.

In Easter Term, *Martin* obtained a rule nisi accordingly, against which

*Jervis* and *Simon* now shewed cause.—The delivery of this bill was a sufficient compliance with the statute. It was expressly decided, in the case of *Lester v. Lazarus* (a), that the objection now taken could not prevail under the stat. 7 Jac. 1, c. 7. *Parke*, B., certainly remarks in that case, that, as the object of the stat. 2 Geo. 2, c. 23, was that the bill should afford sufficient information to the party to enable him to ascertain to what court he should apply for a reference of the bill to taxation, the statement of the court *may*, under the latter statute, be a necessary part of the bill. The case of *Lewis v. Primrose* (b), however, will be mainly relied upon on the other side. But that case is distinguishable, inasmuch as there the bill neither stated the court, nor the name of the cause, in which the business had been done. Moreover, it is to a certain extent overruled by the subsequent case of *Martindale v. Falkner* (c), in which the Court of Common Pleas held that it is not necessary that the bill should be headed in the suit or

(a) 2 C., M., & R. 665. (b) 6 Q. B. 265. (c) 2 C. B. 706.

court, and that it is enough if the items enable a person of ordinary understanding to collect the name of the suit, and the court in which the business was done. [*Alderson, B.*—I certainly see no reason why the court should appear in the heading of the bill. How would you head it if the business was done in several courts?] Admitting, however, that this bill would not have been sufficient under the 2 Geo. 2, c. 23, it is otherwise under the stat. 6 & 7 Vict. c. 73, s. 37, by which, if the business, or any part of it, be common law business, the bill may be referred for taxation to the officer of any one of the common law courts. All that it can be necessary, therefore, for the bill now to shew, for this purpose, is, that some part of the business was done in some common law court. In no case can an attorney escape taxation of his bill since this act. And this bill gives the name of the cause; and it clearly appears from it, that the charges are in respect of business done in an action in one of the superior courts of common law.

*Martin and Hugh Hill, contra.*—The statute was made for the benefit of clients, and to facilitate the taxation of their attornies' bills on their application: and for that purpose it is obviously convenient, and indeed necessary, that information should be given in what court the business was done, in order that the reasonableness of the bill may be more readily ascertained. The client ought not to be sent on an inquiry through all the common law courts mentioned in the act of Parliament. The charges are different even in the different superior Courts, and those of the Court of Pleas at Durham differ materially from those of the Courts at Westminster. There is no reason for coming to a different decision in this respect on the stats. 2 Geo. 2, c. 23, and the 6 & 7 Vict. c. 73. The words "bill of fees, charges, and disbursements," which are used in both, must mean the same in both. The case of *Lewis v. Primrose*, therefore, is a direct authority that this bill is insufficient.

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[*Alderson, B.*—It is difficult to see how a client can be advised whether he ought to have a bill taxed, unless he knows in what court the business was done.] That was the ground of the decision in *Lewis v. Primrose*. Lord *Denman, C. J.*, there says—“This objection must prevail, or the statute be in effect repealed. The very object of the enactment is, that the client, if he likes, may take the bill to another attorney for his advice upon it. Why is the client to be forced to ask questions? and how can we say that he is told in respect of what business the charge is made, when he is not told where the business was done.”

*POLLOCK, C. B.*—I think the rule for a nonsuit must be made absolute. It appears to me that the decision in *Lewis v. Primrose* is an authority to which we ought to adhere, and that there is no ground for drawing a distinction between that case and the present. The bill ought to contain substantial information in what court the business was done, which this bill does not. For aught that appears from it, the business may have been transacted in the Court of Pleas at Durham.

*ALDERSON, B.*—I am of the same opinion. This act, so far as it relates to the delivery and taxation of an attorney's bill, ought to be construed liberally for the client and strictly for the attorney; for the latter knows the law, and the former does not. With the view to the taxation and payment of the bill, if the client desired it, the legislature intended that the client should be informed where each item of the business was done, and that the attorney should hold his hand for a month after the delivery of the bill, for the express purpose of giving the client a full opportunity of ascertaining whether the business was done, and whether the charges are reasonable. For this purpose it is very material that the bill should shew in what court the business was done, because the fees are different in different

courts: and how can an attorney advise a party as to the propriety of taxing a bill, unless he knows in what court the fees were paid? Without such information, he could not know whether, upon taxation, one-sixth of the bill would be struck off or not.

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ROLFE, B., concurred.

Rule absolute.

STEADMAN v. HOCKLEY.

June 3.

**DETINUE.**—The declaration stated, that the plaintiff, to wit, on &c., delivered to the defendant certain deeds, writings, goods, and chattels, [describing them], to be re-delivered by the defendant to the plaintiff; and alleged as a breach, that the defendant had not re-delivered the same, but had unjustly detained them.

A certificated conveyancer has no lien for his charges upon deeds delivered to him, "with and in respect of" which he does certain business for the owner of the deeds.

**Plea.** That the defendant was and is a practising conveyancer, certificated according to the statute, and as such, entitled to certain fees in respect of work and labour done by him in his said profession; that the plaintiff delivered the said deeds, &c. to the defendant, for the purpose of enabling the defendant to do and transact divers affairs and businesses, as such conveyancer, for the plaintiff, *with and in respect* of the said deeds, &c., for certain reasonable fees; that in pursuance of the said purpose, the defendant did do and transact divers affairs and businesses as such conveyancer, *with and in respect of* the said deeds, &c.; and that, at the time of the detention, there was owing to the defendant from the plaintiff, as reasonable fee and reward for his work and labour, &c., the sum of 5*l.* 11*s.* 10*d.*, by reason whereof the defendant was entitled to hold and detain, and did and does detain, the said deeds, &c., as and for a lien for the said sum. Verification. Special demurrer, assigning

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for causes, (inter alia), that it does not appear by the plea, that the employment of the defendant was to do work on the deeds, by which their value was increased; and that the employment stated in the plea is not such as would give the defendant a lien. Joinder in demurrer.

*Bovill*, in support of the demurrer.—This plea is bad in substance and in form. The question of substance is, whether a certified conveyancer, who does work “in respect of” deeds delivered to him, has a lien on them until payment of his charges. This plea does not state that the defendant has done any work *on* the deeds, whereby their value has been increased, but only that he did business as a conveyancer, “with and in respect of the said deeds.” He does not rely upon any agreement or custom; but says, that at common law he has a lien, by reason of the relation of himself and his client. If that be so, every person employed to do any thing with or by means of a document of any kind, will claim a lien. The true principle is laid down by the Court in *Scarfe v. Morgan* (a), that, “where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect.” [*Pollock*, C. B.—Suppose you supplied a tailor with the implements of his trade, or with a coat as a pattern, could he have any lien upon it?] *Sanderson v. Bell* (b) very closely resembles this case. There, a mortgage-deed had been delivered to an auctioneer to obtain payment of the principal and interest due upon it; and, it was held, that he had no lien upon the deed in respect of his charges for making applications for such payment, upon the ground that “there was no work done upon the subject-matter in dispute.” [He then took some objections of form to the plea.]

(a) 4 M. & W. 283.

(b) 2 C. & M. 304.

*Udall*, contra.—The plea is good. It is not necessary, in order that the lien should attach, that the work done should be absolutely mixed up with the chattel, so as to make it more valuable. There are several cases that do not fall within that principle; for instance, that of a jeweller for weighing a diamond, mentioned by *Gibbs*, C. J., in *Hollis v. Claridge* (a). [*Rolfe*, B.—Is not that work done whereby the value of the chattel is increased? *Pollock*, C. B.—It is like measuring corn; the value is increased by the weight or measure being ascertained. A bale of cloth, the quantity of which is known, is more valuable than a bale, the quantity of which is not known.] The weight is not necessarily known to anybody but the person weighing it, and the chattel would be returned in exactly the same state in which it was bailed. Again, an auctioneer has a lien for his commission on the sale of a chattel: *Williams v. Millington* (b). [*Pollock*, C. B.—It is part of his duty to take it into his possession.] That is only a duty arising out of his contract; he does nothing *on* the chattel. In modern times the Courts have leaned much in favour of particular liens. Thus, a warehouseman is now held to have a lien; and it is said also that a dock-owner has. The true principle is, that a lien arises in all cases of the fifth class of bailments mentioned by Lord *Holt* in *Coggs v. Bernard* (c), that is, “a delivery to carry or otherwise manage, for a reward to be paid to the bailee;” unless, in the nature of the chattel itself, there is something inconsistent with a lien, as in the case of a livery-stable keeper, or an agister of cattle, by reason of the general right of property of the owner of the animal: *Jackson v. Cummins* (d). A certificated conveyancer may maintain an action for his fees: *Poucher v. Norman* (e). In *Sanderson v. Bell*, nothing was

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(a) 4 Taunt. 308.

(b) 1 H. Bl. 81.

(c) 2 Ld. Raym. 917.

(d) 5 M. &amp; W. 342.

(e) 3 B. &amp; C. 744.

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done with the deed. [*Rolfe*, B.—How does it appear that more was done here than there? We have no judicial knowledge that a conveyancer does any thing with the deeds delivered to him; and this plea does not say what the defendant did. *Alderson*, B.—Your plea does not shew that the defendant has employed his labour on this deed; that he has read it, or written an opinion on it; in which case he would re-deliver it, with the opinion upon it.] He cited, also, *Ex parte Ockenden* (a), *Ex parte Groves* (b), *Philips v. Robinson* (c), *Chapman v. Allen* (d), *Judson v. Eterhidge* (e).

*Bovill*, in reply, was stopped by the Court.

*POLLOCK*, C. B.—The plaintiff is entitled to the judgment of the Court. The defence set up in this action is a lien, and the question is whether a conveyancer, as such, has a lien upon a deed “with and in respect of” which he has transacted some other business. The principle applicable is well stated by *Tindal*, C. J., in *Bleaden v. Hancock* (f). He says, “This is not the case of a lien claimed by a person who has bestowed labour or expended money upon an article, and who may detain it until he is paid. Every body knows that by the common law a man may detain the commodity on which he has bestowed labour or money.” Nobody appears to have suggested in that case, that, independently of any custom, there was a lien at common law, because of something done “with and in respect of” the plates which were delivered to the defendant. With respect to the cases which have been referred to, of the jeweller weighing the diamond, and of the measuring of corn, by which the value of the thing is not apparently increased, the answer is that the labour is bestowed upon the

(a) 1 Atk. 235.

(b) 3 Bing. N. C. 304.

(c) 4 Bing. 106.

(d) Cro. Car. 271.

(e) 1 C. & M. 743.

(f) 4 C. & P. 152.

article itself. If a man has a lien for carrying corn, why should he not also for letting it pass through any other process which makes it more valuable, or appears to do so? An ingot of gold is more valuable when it has been assayed by the standard; it is more likely then to find a purchaser, its quality having been ascertained: so also is an article of which the quantity has been ascertained. These cases, therefore, fall within the rule that the lien exists wherever labour has been bestowed upon the article itself; here all that appears is that something has been done "with respect of" it: that does not create a lien.

On principle, therefore, and upon the authorities, I am of opinion that this plea is bad.

ALDERSON, B.—The lien is claimed in this case at common law. Now a lien at common law exists only in respect of articles on which the labour of the bailee has been expended; but it does not appear by this plea that any labour has been expended on this article.

ROLFE, B.—I am of the same opinion. I rather doubt whether some of the cases which have been mentioned, as that of weighing the jewel, are not a straining of the rule; if they are sound, it must be upon the principle stated by my Lord.

PLATT, B., concurred.

Judgment for the plaintiff.

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June 4.

DOE *d.* CUNDEY *v.* SHARPLEY.

The stat. 1 Geo. 4, c. 87, s. 1, enabling landlords to recover possession of premises unlawfully held over by tenants, does not apply to the case where the tenant holds under a lease, which has not expired by lapse of time, but a right of re-entry is claimed for non-performance of the covenants.

MILLER, on the part of the lessor of the plaintiff, moved for a rule calling upon the tenant in possession to shew cause why, in addition to the common rule and undertaking, he should not also, in case of a verdict for the plaintiff, give judgment of the term next before the trial, and why he should not enter into a recognizance by himself and sureties, to pay the costs and damages which should be recovered by the plaintiff, pursuant to the stat. 1 Geo. 4, c. 87, s. 1. It appeared from the affidavit, that the tenant in possession held the premises under a lease, which had not expired by effluxion of time, but the lessor of the plaintiff claimed the premises under a proviso for re-entry, for non-performance of the covenants.—The question is, whether the statute applies to such a case. It has been held not to apply where the lessee held over after notice to quit given by himself; *Doe d. Earl of Cardigan v. Roe* (a); nor to a case where the term, not having expired by lapse of time, has been surrendered. *Doe d. Tindal v. Roe* (b).

PER CURIAM.—The statute certainly does not apply to such a case as the present. There will therefore be no rule.

Rule refused.

(a) 1 D. & R. 540.

(b) 2 B. & Adol. 922.

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## CULVERWELL v. NUGEE.

June 4.

**W**ILLES had obtained a rule, calling upon the defendant to shew cause why the plaintiff should not be at liberty to amend the alias and pluries writs of summons, by indorsing thereon the day of the date of the first writ of summons, and of the return thereto; the object of the amendment being to save the Statute of Limitations.

The Court will amend alias and pluries writs of summons, by indorsing thereon the day of the date of the first writ of summons and of the return thereto, in order to save the Statute of Limitations, notwithstanding the 2 Will. 4, c. 39, s. 10.

*Gray* shewed cause.—To grant this application would be in effect to repeal the 10th section of the Uniformity of Process Act, 2 Will. 4, c. 39, which enacts, that “no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of any action may be limited, &c., unless every writ issued in continuation of a preceding writ shall contain a memorandum indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ and return.” [*Pollock, B.*—In *Lakin v. Watson* (a), this Court allowed a writ of summons to be amended by inserting the name of a co-executrix as a co-plaintiff, in order to save the Statute of Limitations.] That case was cited, as also was that of *Baker v. Neaver* (b) to the same effect, in *Roberts v. Bate* (c), in which case the Court of Queen’s Bench refused to allow the amendment of a writ of summons for such a purpose. This is an express enactment, that no writ shall prevent the operation of the Statute of Limitations, unless it shews the date of the first writ, and of its return.—He referred also to *Brown v. Fullerton* (d).

*Willes* was not called upon to argue in support of the rule.

(a) 2 C. &amp; M. 685.

(c) 6 Ad. &amp; E. 778.

(b) 1 C. &amp; M. 112.

(d) 13 M. &amp; W. 556.

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POLLOCK, C. B.—The question in this case really is, whether the authority of the Court to amend its own records is put an end to by the Uniformity of Process Act. We are all of opinion that it is not. The power of amendment is inherent in the Court, wherever there is anything to amend by. The rule will be absolute on payment of costs.

ALDERSON, B.—I am of the same opinion. Soon after the passing of the Uniformity of Process Act, the Courts held that they had no power to amend writs under that statute; but the evil of refusing an amendment in the case of the Statute of Limitations convinced us that we had come to an improvident resolution, and we found it necessary to retrace our steps. We amend, therefore, in certain cases, where we can see from our own records what is the amendment that ought to be made.

ROLFE, B., and PLATT, B., concurred.

Rule absolute.

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June 5.

## SMITH v. JEFFRYES.

**ASSUMPSIT** for the non-delivery of potatoes, sold by the defendant to the plaintiff by the following written contract:—

"I hereby agree to sell Mr. Smith, of Tanner-hill, Deptford, sixty tons of ware potatoes, at £5 a-ton, and for which he has given me a bill for £250 for three months, and is to give £50 cash on Friday next. Dated the 27th day of October, 1845.

"SAMUEL JEFFRYES."

Plea (amongst others), non assumpsit.

At the trial, before Lord *Denman*, C. J., at the last assizes for the county of Kent, it appeared upon the plaintiff's evidence, that there were three qualities of potatoes known in the neighbourhood where the contract was made, —namely, wares, middlings, and chats, of which wares were the largest and best, and the plaintiff proved that he had in fact contracted for the purchase of the best quality, of a particular kind, viz. "Regent's wares," whereas those which the defendant had offered to deliver were wares of a different, and, as the plaintiff alleged, an inferior kind, viz. "kidney wares." This evidence was objected to, but his Lordship received it, and told the jury, in summing up, that if they thought the defendant, when he contracted to deliver ware potatoes, meant, and in fact contracted, to deliver regent's ware potatoes, the plaintiff was entitled to recover. The jury accordingly found for the plaintiff.

In Easter Term, *Shee*, Serjt., obtained a rule nisi for a new trial, on the ground that the evidence had been improperly received, and the jury had been misdirected in respect of it.

*Montagu Chambers* and *Massy Dawson* now shewed cause.—This evidence was admissible. The ambiguity in

The defendant, by a written contract, agreed to sell the plaintiff 60 tons of "Ware potatoes," at £5 a ton. It appeared in evidence that in the neighbourhood three qualities of potatoes were known, "Wares, Middlings, and Chats," Wares being the largest and best:—*Held*, that evidence was not admissible to shew that the plaintiff had in fact contracted for the sale to him of a particular kind of Ware potatoes, viz. "Regent's Wares," while those offered to him by the defendant were of an inferior kind, viz. "Kidney Wares."

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this case was a latent one, which arose out of the extrinsic evidence given to explain the meaning of a particular word used in the written contract. As you resort to extrinsic evidence to explain the meaning of the word, you may use the same evidence to explain the ambiguity. When it had been shewn by parol evidence that "ware" potatoes meant the best and largest of any kind of potatoes, it became necessary to shew, and the same evidence was properly used for that purpose, what kind of ware potatoes the defendant contracted to supply. [*Alderson*, B.—This is not a latent ambiguity. A latent ambiguity is, where you shew that words apply equally to two different things or subject-matters, and then evidence is admissible to shew which of them was the thing or subject-matter intended. But when this contract uses a term which signifies the largest and best of any kind of potatoes, it uses a term which means only one thing.] The term has a general meaning, which requires explanation in the particular case. [*Alderson*, B.—If I buy sixty tons of potatoes, surely the seller may deliver me kidney potatoes.] They cited *Doe d. Oxendon v. Chichester* (a), *Birch v. Depeyster* (b), and *Clayton v. Gregson* (c).

*Shce*, Serjt., contra, was not called on.

PER CURIAM (d).—We think it is clear in this case that the evidence ought not to have been received. It went to vary and limit the written contract between the parties. There must be a new trial.

Rule absolute.

- (a) 4 Dow, 56.
- (b) 1 Stark. Rep. 210.
- (c) 5 Ad. & E. 302.

- (d) *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

1846.

## JACKSON and WIFE v. SMITHSON.

June 5.

**CASE.** The declaration stated that the defendant heretofore, to wit, on &c., and from thence until and at the time of the injury and damage being sustained by the plaintiff Catherine Ann, as hereinafter mentioned, wrongfully and injuriously did keep a certain ram, he the defendant during all that time well knowing that the said ram then was, and continued to be, prone and used and accustomed to attack, butt, and injure mankind; and which ram afterwards, and whilst the defendant so kept the same as aforesaid, to wit, on &c., by reason of the premises, did then attack, butt, and gore the said Catherine Ann, and cast and throw her down to and upon the ground, divers, to wit, five times, and thereby the said Catherine Ann then greatly hurt and injured, &c., &c.

The defendant pleaded not guilty, and other pleas, and at the trial, before Lord *Denman*, C. J., at the last assizes for the county of Kent, the plaintiff obtained a verdict with £10 damages.

Declaration in case stated, that the defendant wrongfully and injuriously kept a ram, well knowing that he was prone and accustomed to attack, butt, and injure mankind: and that the said ram, while the defendant so kept the same, attacked, butted, and threw down, and thereby hurt the plaintiff:—

*Held* sufficient, on motion in arrest of judgment, without shewing that the defendant negligently kept the ram.

In Easter Term, *Shee*, Serjt., obtained a rule nisi for arresting the judgment, on the ground that the declaration was bad, for not averring that the defendant *negligently* kept the ram.

*Montagu Chambers* and *J. Brown* now shewed cause, and cited the following authorities, as shewing that the declaration disclosed enough to sustain the action, in averring that the ram was an animal prone and accustomed to injure mankind, that the defendant kept him knowing him to be such, and that he did injury to the plaintiff,—the scienter being the gist of the action; and that this form of declaration had been adopted from the earliest times:—Regist. Brev. fol. 110 b, 111; Liber Placitandi, fol. 40, pl. 56;

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*Cropper v. Matthews* (a), *Rex v. Huggins* (b), *Jenkins v. Turner* (c), *Smith v. Pelah* (d); 1 Saund. 37, n. (1).—As it appeared, however, that the Court of Queen's Bench had a few days before decided that very point, in a case of *May v. Burdett*, the Court intimated that they were bound by that decision, and called upon

*Shee*, Serjt., and *Wordsworth*, in support of the rule.—It must distinctly appear on the face of the declaration that the plaintiff has a cause of action. The mere allegation that the defendant “wrongfully and injuriously” kept the ram, is not sufficient; the reasonable meaning of that is, not that the defendant *improperly* kept the animal, but that it was an improper thing to keep it at all. But a man has a right to keep any animal, however dangerous it may be in its nature, if he use due and proper caution in the keeping of it; and the fact that the defendant did so is not excluded by the declaration in this case. No doubt, if he is *negligent* in the keeping of it, and damage ensues thereby, he is liable. In *Rex v. Huggins*, Lord *Holt* says,—“If the owner have notice of the mischievous quality of the ox, &c., and he uses all proper diligence to keep him up, and he happens to break loose and kill a man, it would be very hard to make the owner guilty of felony; but if *through negligence* the beast goes abroad, after having a notice of his condition, it is the opinion of *Hale*, that it is manslaughter in the owner.” In *May v. Burdett*, the animal that did the injury was a monkey, a creature altogether *feræ naturæ*, which nobody has a right to keep at all, except under proper control; but a ram is an animal which is kept lawfully, and the owner is not liable for mischief done by it, unless it appear that he has kept it *negligently*.—They cited Com. Dig., Action on the Case, Negligence, (A. 5); and *Jones v. Perry* (e), *Hartley v. Harriman* (f),

(a) 2 Sid. 127.

(b) 2 Ld. Raym. 1533.

(c) 1 Ld. Raym. 109.

(d) 2 Stra. 1264.

(e) 2 Esp. 482.

(f) 1 B. & Ald. 620.

*Blackman v. Simmons* (a), *Sarch v. Blackburn* (b), and *Curtis v. Mills* (c), in all which cases the declaration contained an averment of negligence.

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POLLOCK, C. B.—The case which has been decided in the Court of Queen's Bench, of *May v. Burdett*, is a binding authority upon us on this point, and we must leave the parties to go to a court of error, if they think they have any ground for reversing our judgment.

ALDERSON, B.—I am of the same opinion, and think we are bound by that decision. In truth, there is no distinction between the case of an animal which breaks through the tameness of its nature, and is fierce, and known by the owner to be so, and one which is *feræ naturæ*.

PLATT, B.—No doubt a man has a right to keep an animal which is *feræ naturæ*, and nobody has a right to interfere with him in doing so, until some mischief happens; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible.

Rule discharged.

(a) 3 C. & P. 138.

(b) 4 C. & P. 297.

(c) 5 C. & P. 489.



1846.

June 6.

Where an action is commenced against a feme sole, who marries during the pendency of it, and the plaintiff obtains judgment against her in her name when sole, and she is taken under a ca. sa. sued out upon such judgment, the Court will not discharge her out of custody on the ground that she has no separate property.

## BEYNON v. MARGARET JONES.

**E. V. WILLIAMS**, in last Hilary Term, obtained a rule calling upon the defendant to shew cause why an order of *Rolfe*, B., for discharging her out of the custody of the sheriff of Cardiganshire, should not be rescinded, and why the sheriff should not be directed to retake her, or why the plaintiff should not be at liberty to issue execution afresh against her. It appeared on the affidavits, that this action had been commenced against the defendant in March, 1845, at which time she was a widow; that, on the 8th of April, 1845, she married one Davies; that, on the 30th of April, an appearance was entered for her by the plaintiff pursuant to the statute; and that, on the 31st of May, judgment was signed against her in the name of Margaret Jones, and a testatum ca. sa. issued thereon, under which she was afterwards taken in execution. On the 19th of December last, *Rolfe*, B., made an order for her discharge out of custody, on the ground of her being a married woman, having no separate property.

*Gray* shewed cause against the rule in Easter Term (April 16). The only difference that can be suggested between this case and the ordinary case of the discharge of a feme covert out of custody on a ca. sa., is, that here there is no judgment against the husband, and therefore he cannot be taken in execution. But that circumstance makes no difference in principle. In the ordinary case, where the judgment is obtained against husband and wife, the wife is discharged, not as a matter of strict right, but as matter of favour, on the ground that, as she is not possessed of any separate property, no benefit can be derived to the creditor by keeping her in custody, and she has no means of obtaining her liberty by satisfying the execution: *Sparkes v. Bell* (a), *Hoad v. Matthews* (b). Here, the judgment and

(a) 8 B. &amp; C. 1.

(b) 2 Dowl. P. C. 149.

execution are regular; the action did not abate by the marriage: *King v. Jones* (a); and the defendant could not plead her coverture in abatement. The Court, therefore, it is submitted, will equally extend its favour to her as in the ordinary case of a judgment against husband and wife. The case of *Chalk v. Deacon* (b) was cited on the motion for this rule. There, no doubt, the Court laid it down that the discharge of a married woman from custody under a ca. sa. was a matter for their discretion, to be exercised under all the circumstances of the case. In *Cooper v. Hunchin* (c), the application was made for her discharge on the ground of an irregularity, which the Court denied, on the authority of the case of *Doyley v. White* (d). In *Moses v. Richardson* (e), she was a married woman at the time of action brought, and therefore had her remedy by writ of error. In *Evans v. Chester* (f), the judgment of the Court proceeded on the ground that the affidavit was defective, in not shewing that the defendant had no separate property; although it is also said in that case that the husband might bring a writ of error, which is certainly a mistake. The present plaintiff might have made the husband a party to the judgment by *scire facias*, if he pleased. [*Relfe*, B.—Is there anything in the Imprisonment for Debt Act which prevents a married woman from taking the benefit of the Insolvent Debtors' Act?] Not in the act itself; but *Ex parte Deacon* (g) is an authority that she cannot.

*E. V. Williams*.—This is a question as to which there is no direct authority. It is admitted on the other side that the proceedings have been perfectly regular; that the judgment has been executed in the only way that the law would allow; and that under that judgment and writ the

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(a) 2 Ld. Raym. 1525.

(b) 6 Moore, 128.

(c) 4 East, 521.

(d) Cro. Jac. 323.

(e) 8 B. & C. 421.

(f) 2 M. & W. 847.

(g) 5 B. & Ald. 759.

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defendant has been lawfully taken in execution. How, then, can she be entitled to be discharged? No doubt the practice is established by the decisions, that when the action is commenced against husband and wife, after the marriage, and there is a judgment against both, the Courts will discharge the wife on a satisfactory affidavit of her having no separate property. But that practice is, in truth, a stretch of the authority of the Courts, trenching upon the common law, which the Court will not be disposed to extend. There is no foundation for it prior to the case of *Chalk v. Deacon*, in the year 1821, in which the only authority cited was a passage from Tidd's Practice; and all that the Court said in that case was, that, supposing them to have the discretion, they would not exercise it under the circumstances: and the principle upon which the Courts have since acted is, that where the judgment is against both husband and wife, and the wife has no separate property, it is mere idle tyranny to keep her in custody. It is by no means clear, in the present case, that the plaintiff could have a scire facias against the husband and wife, or that the taking of her only would not be a satisfaction of this judgment. But, at all events, the plaintiff has done no more than the law permits: the proceedings are all regular; and the Court will not interfere to prevent the law from taking its regular course, and to deprive the plaintiff of the fruits of her judgment.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—In this case, my Brother *Rolfe* having made an order for discharging the defendant, a married woman, out of custody, she having been taken in execution on a ca. sa., a rule was obtained by Mr. *E. V. Williams* for the plaintiff, calling on the defendant to shew cause why the order should not be discharged, and why the sheriff should not retake the defendant.

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The case was argued last term, and there being no authority precisely in point, we took time to consider our judgment. The facts are very simple. The plaintiff sued the defendant in March, 1845, when she was a widow. In April, 1845, she married a second husband named Davies. The plaintiff took no notice of this, but proceeded in the action, and, on the 31st May, signed judgment against the defendant, by her former name of Margaret Jones; and on this judgment sued out a writ of ca. sa. against her alone. It is admitted that the defendant has no separate property; and the question is, whether my Brother *Rolfe*, under these circumstances, did right in ordering her to be discharged.

The whole practice of discharging married women, who are in lawful custody on a ca. sa., is of very recent date, and certainly appears to rest on no principle whatever. The writ of ca. sa. is the right of the plaintiff as the result of his judgment; and it is admitted, that, under such a writ, the sheriff is bound to take the party against whom the writ is directed, whether she be under coverture or not: he is bound to do so, not only where she is sued with her husband, but also where, as in this case, she has been sued alone as a feme sole, and has married during the suit: *Doyley v. White* (a). Since, therefore, the plaintiff has a right to take the feme covert in execution, and to detain her in satisfaction of his debt, it would seem, on all principle, to follow, that the Court cannot interfere to discharge her out of custody, unless there be some special circumstances requiring the Court, in the exercise of its equitable jurisdiction, to interfere and prevent the plaintiff from availing himself of his legal right. But certainly, in modern times, the Courts, where judgment has been recovered against a husband and wife, and both have been taken in execution, have assumed the right of discharging the wife out of custody, if she has no separate property, on no other

(a) Cro. Jac. 323.

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ground, apparently, than that it is hard to detain in custody a defendant who cannot, by law, acquire property wherewith to satisfy the debt. This, it must be admitted, is rather making the law than administering it. At the same time, the practice has prevailed so long in the case of a judgment against husband and wife, that in such a case we should probably not feel ourselves warranted in deviating from the ordinary course. But, in the case of a rightful judgment against a married woman *alone*, there is no decided case authorising the Court in discharging her, when she has been taken on a *ca. sa.*; and there is certainly a distinction between that case and the case of a judgment against husband and wife. In the former case, the discharge of the wife deprives the plaintiff of *all* possible chance of recovering his debt; whereas, in the latter, he still has the husband to whom he may resort. The distinction is not, indeed, at all satisfactory. There seems to be no more principle to warrant the Court in depriving a plaintiff of part of his legal right, than in depriving him of the whole. Still it may be said, that, in one, the practical injustice is less than in the other; and therefore, although finding the practice established in the case of a judgment against husband and wife, we might not feel justified in refusing to act, in the case of a joint execution, on what must be considered as the established practice; yet, seeing no principle to warrant us, and it being admitted that no case can be found in which a married woman has been discharged, where she has been the sole defendant, and has been taken on a *ca. sa.*, we do not feel warranted in discharging her in this case, and so altogether depriving the plaintiff of the fruit of his judgment.

The consequence is, that the rule discharging my Brother *Rolfe's* order, and directing the sheriff to retake the defendant, must be made absolute.

Rule absolute.

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June 6.

The MAYOR, ALDERMEN, and BURGESSES of the BOROUGH  
of POOLE v. WHITT.

**COVENANT** on an indenture of lease, dated 25th March, 1843, by which the plaintiffs demised to the defendant their markets and fairs, weekly, yearly, and from time to time kept and held in and within the borough and county of the town of Poole, together with the market-houses, fish-shambles, shades, shambles, booths, standings, &c., mentioned in the schedule of the indenture, and the customs and tolls, &c., to the markets and fairs belonging &c., for three years, at the yearly rent of £206, payable quarterly. Breach, that two years' rent was due.

Plea, that, before the making of the indenture in the declaration, to wit, on 22nd December, 1837, R. H. Parr impleaded the now plaintiffs on a bond, dated 29th November, 1836, conditioned for payment to him out of the borough funds, by instalments of £4500, a sum assessed to him by the council of the borough as compensation for the salary and emoluments of his office as town-clerk of Poole, to which he had not been appointed under 3 & 4 Will. 4, c. 76; upon which bond he had recovered, 8th December, 1838, and had judgment of elegit of the plaintiffs' lands and hereditaments. The plea then set out the inquisition taken in the premises, on 17th December, 1838, stating that the jury found the plaintiffs to be seised of the demised premises, which were then leased to T. Brown for seven years, beginning from 29th September, 1844, at £250 yearly rent, and were also subject to a mortgage, dated 5th March,

Covenant for rent on a lease. Plea, that, before the lease was made, one P. impleaded the plaintiffs, and had judgment of elegit against their lands, &c.: that the inquisition found plaintiffs seised of the demised premises then leased to B., subject to two mortgages for years: that the sheriff delivered the demised premises to P., to hold, &c. till his damages and costs should be levied thereout: that, before the rent became due, defendant was evicted by P., who entered, and then ejected, expelled, put out, and removed defendant therefrom, and kept and continued him so ejected, &c.: that £1000 was still due to P. which was not levied. Replication traversed

the eviction in the words of the plea. At the trial the lease, elegit, and inquisition, were put in, and it was proved that P. had called on defendant to pay him rent, or he, P., would turn him out, on which defendant attorned to him, without privity of the plaintiffs, his lessors:—*Held*, that the plaintiffs were entitled to recover, as P.'s elegit only entitled him to the reversion expectant on the mortgages by the lessors. *Held*, also, that the expulsion, as pleaded, was not established by the evidence.

*Semble*, that if a party, having a paramount right to evict a party in occupation of premises, goes to him claiming to exercise his right, on which the tenant consents to change the title under which he holds, and attorns to the claimant accordingly, that would be equivalent to an expulsion.

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1822, to J. Seager, for securing £500 and interest, for the term of 1000 years, and to a further mortgage, dated 6th March, 1822, to Hancock, for £300 and interest, for a term of 500 years, subject to the first mortgage. The jury found the markets, &c., with the customs, tolls, and profits thereto belonging, to be worth £250 per annum. The plea then stated, that the sheriff delivered the said markets, &c., at the reasonable price and extent aforesaid, to Parr, to hold to him and his assigns, as his freehold, according to the form of the statute, &c., until the damages, costs, and charges should be fully levied; and that the markets, &c., so delivered, were the same as were demised by the plaintiffs to the defendant; and that, before any part of the rent or money in the declaration became due, on 5th April, 1843, Parr, by virtue of the delivery aforesaid, entered on the said markets, &c. &c., and became seised thereof as of his freehold, until &c., and then ejected, expelled, put out, and amoved the defendant therefrom, and from the possession and enjoyment of every part thereof, and kept and continued him so ejected, &c. Averment, that Parr had not yet levied the damages, costs, and charges, but a great part thereof, to wit, £1000, is yet due to Parr, not levied or satisfied.—Verification.

The second, third, and fourth pleas were nearly similar, setting out three other elegits for three several instalments of the bond debt to Parr, issued as each became due, the last being dated 5th March, 1841. The replication traversed the eviction in the words of the pleas.

At the trial, before *Erle, J.*, at the last Assizes for Dorsetshire, the documents stated in the plea were produced; and it appeared that Parr had called on the defendant to pay rent to him, adding, that if he did not, he, Parr, would turn him out. The defendant then paid Parr three quarters of a year's rent, and attorned to him without privity of the plaintiffs.

Verdict for the plaintiffs for £412, with leave to the defendant to move to set aside the verdict for the plaintiffs,

and enter it for the defendant, if the Court should be of opinion against the plaintiffs on both points.

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*Cockburn* having obtained a rule nisi accordingly,

*Crowder, Stock, and Maynard*, now shewed cause.—First, on these pleadings, Parr had no legal title to evict the defendant. The plaintiffs, after having mortgaged the premises for years, let them to the defendant. They had, therefore, an equity of redemption during the terms created by them; but while the mortgages remained unsatisfied, the mortgagees did not become their trustees, so as to bring the case within stat. 1 & 2 Vict. c. 110, s. 11, authorising hereditaments held in trust for debtors to be taken in execution (*a*). But Parr, by his elegit against the plaintiffs, could not take more than their reversion expectant on the expiration of the mortgages; for, as an equity of redemption cannot be “held in trust” within 29 Car. 2, c. 3, s. 10, it was therefore not extendible at law: *Lyster v. Dolland* (*b*), *Doe d. Hull v. Greenhill* (*c*), *Harris v. Booker* (*d*). Nor is it rendered so by 1 & 2 Vict. c. 110, s. 11, or s. 13 (*e*). For, as this defendant, being tenant to the plaintiffs, cannot dispute their power to demise (*f*); so, on the other hand, Parr, even if clothed by his elegit with the plaintiffs’ equity of redemption, could not evict the defendant unless on such a title as would have enabled him also to support ejectment against him. Now, in that action, the legal title of the mortgagees would prevail, notwithstanding the defendant’s attornment: *Doe d. Hull v. Greenhill* (*g*). [Rolfé, B.—

(*a*) See Burton on Real Property, 3rd edit. 481.

(*b*) 3 Bro. Ch. C. 477; 1 Ves. jun. 435.

(*c*) 4 B. & Ald. 684.

(*d*) 12 Moore, 283; 4 Bing. 96.

(*e*) See Jarman’s Conveyanc-

ing, 3rd edit. p. 50; Sugden’s Vendor and Purchaser, 11th edit.

665; and see 1 Wms. Saund. 69 b.

(*f*) See *Doe d. Johnson v. Baytup*, 3 Ad. & E. 188. So held where tenant was in by license only.

(*g*) 4 B. & Ald. 684. See



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You say, first, that attornment without actual expulsion will not suffice; and next, that, if it would, the party expelling must have had title to recover in ejectment.] Yes. *Hawkes v. Orton* (a) was covenant on an indenture. The breach was, that the defendant "expelled and kept out" the plaintiff; thus alleging the actual fact, not using the word "evict," which has a technical meaning. [*Pollock*, C. B.—The corporation, whether by assent of their mortgagees or not, granted the lease after the elegit had issued at suit of Parr: Parr then went to the defendant, their tenant, and set up his title by elegit as paramount to theirs; but the defendant could not dispute their title being in fee. Sect. 13 of 1 & 2 Vict. c. 110, seems to shew that the remedy is in equity (b).] Secondly, if Parr had any title to evict the defendant, that title, as laid in the plea, is not proved; expulsion is alleged, but no eviction in fact, or circumstances tantamount to it, appear. Nor would the title alleged enable Parr to enter and eject the defendant. [*Alderson*, B.—If the title admitted on record is taken by both parties to be real as so admitted, would adding an attornment make the plea good? If it would not, then to add it to the title relied on in evidence would be equally ineffectual. Here only attornment being shewn, it must be taken as coupled with the title laid in the plea, that being a title which would not have enabled Parr to bring ejectment. *Pollock*, C. B.—The questions are, first, can evidence of attornment be substituted for that of actual expulsion? second, if the defendant ought to have attorned to Parr, as a person entitled by law to turn him out, is the attornment equivalent to proof of actual expulsion(c)? and third,

*Harris v. Booker*, 4 Bing. 97; also *Harris v. Pugh*, Id. 335; *Doe d. Wigan v. Jones*, 10 B. & C. 459; also 3 Simons's Rep. 287; 6 Simons's Rep. 317; *Dundas v. Dutens*, 1. Ves. sen. 98;

*In re Dearden*, 3 Myl. & K. 508. (a) 5 Ad. & E. 367; and see *Cox v. Painter*, 6 Ad. & E. 491. (b) See Sugd. V. & P., 11th ed. 662, 961. (c) See 5 Ad. & E. 367.

is the charge by way of elegit created under stat. 1 & 2 Vict. c. 110, s. 11, a charge on the interest existing between the parties to this action?] Whether or not the lessors assented to payment of rent to Parr by their former tenants, makes no difference; for even a written authority by them to the defendant to pay rent would not change his tenancy: *Wheeler v. Branscombe* (a).

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*Cockburn, Barstow, and Poulden*, in support of the rule.—The plaintiffs having only mortgaged for years, their reversion passed to Parr under the elegit, so as to enable him to sue the corporation in ejectment. In *Plunket v. Penson* (b), the mortgage in question was in fee; and Lord *Hardwicke* says, “If there is a mortgage for a thousand years, and the reversion in fee is left in the mortgagor, it will be legal assets, because the bond creditor might have judgment against the heir of the obligor, with a cesset executio till the reversion comes into possession; but where it is a mortgage of the whole inheritance, I do not see what remedy a bond creditor can have to make it assets at law.” [*Rolfe, B.*—Suppose a mortgagor in fee to be in possession, his chattel interest could not be taken by elegit. These questions would not have arisen if mere possession by the mortgagor entitled a sheriff to deliver the land as his freehold to a creditor by elegit.] Again, if the defendant could not, as tenant, dispute the title of his lessors the plaintiffs, they, on the other hand, after demising to him in fact, could not deny their title so to demise. In *Pope v. Biggs* (c), the lease in question had been granted after the mortgage; and *Bayley, J.*, says, “I have no doubt that, in point of law, a tenant who comes into possession under a demise from a mortgagor after a mortgage executed by him, may consider the mortgagor his landlord, so long as the mortgagee allows the mortgagor to continue in possession and receive the rents, and

(a) 5 Q. B. 373.

(b) 2 Atk. 290.

(c) 9 B. & Cr. 245. See 2 Bing. N. C. 538; 7 Bing. 595.

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that payment of the rents by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. But the mortgagee, by giving notice of his mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents (a). It is undoubtedly a well-established rule, that a lessee cannot dispute the title of his lessor at the time of the lease; but he is at full liberty to shew that that title has been put an end to." [Pollock, C. B.—What the Court there held was, that payment of rent to a mortgagee after notice of the mortgage, was equivalent to paying the lessor.] Whether this attornment amounted to eviction or not, it seems, from *Rogers v. Pitcher* (b), that a tenant by elegit may obtain actual possession without bringing ejectment. [Alderson, B.—Proof of expulsion is necessary for the purpose of your argument.] *Evans v. Elliott* (c) shews, that a right to receive rent and an attornment are together equivalent to an actual eviction, if the tenant changes the title under which he holds. [Alderson, B.—There a tenant, being in possession under a lease granted by a mortgagor after the mortgage, attorned to the person who might have turned him out, viz. the mortgagee.] Further, when the lease was granted to defendant, Parr's position was at least equal, if not superior, to that of a second mortgagee; for he was also in possession by receiving rent from the former tenant West, and could have ejected the lessors in spite of a prior mortgage by them: *Lindsay v. Lindsay* (d), *Doe d. Watton v. Penfold* (e), *Doe d. Levy v. Horne* (e). [Alderson, B.—Lord Denman's judgment in the last case proceeds on the party's silence as to the fact of a previous mortgage having been made. Here the inquisition recites the prior mortgages, and fixes

(a) See *Johnson v. Jones*, 9 Ad. & E. 809; *Davies v. Stacey*, 12 Ad. & E. 506; *Wheeler v. Branscomb*, 5 Q. B. 373, 379. (b) 6 Taunt. 207. See 2 Wms. Saund., 5th ed. 69 a, note (e). (c) 9 Ad. & E. 342. (d) Bull. N. P. 110 a. (e) 3 Q. B. 757.

the defendant with knowledge of them.] In *Doe d. Hull v. Greenhill* (a), before the *elegit* relied on by the lessor of the plaintiff had been obtained, the possession had been actually recovered at law against the same defendant, under a previous conveyance in trust of the premises, by the person beneficially entitled, who had ever since received the annuity so secured; and the Court said it would be quite an anomaly in the law to allow the *elegit* creditor to recover possession of land liable to be defeated at the suit of another, claiming under a title created before the time of such recovery, and actually existing at the time.

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POLLOCK, C. B.—This is an application to enter a verdict for the defendant, the verdict at the trial having been for the plaintiffs. The action was in covenant for rent on a lease. The plea in effect alleged, that it was true that the defendant was lessee, but that the lessors had become liable to pay money to one Parr, and gave him a bond on which he sued and perfected an *elegit* in 1838, and that the lease to the defendant was granted in 1843. The plea then set out the inquisition on the *elegit*, which found that the lessors, prior to granting the lease to the defendant, had executed two mortgages for years to other persons. The concluding allegation was, that Parr, acting under the *elegit*, had expelled and put out the defendant. The only question was, whether Parr did put him out or not? Now, if a party, having a good right to eject the occupier of demised premises, goes there and demands to exercise that right, and the tenant says, "I will change the title under which I now hold, and will consent to hold under you," that, according to good sense, is capable of being well pleaded as an expulsion. And if, as has been argued, Parr had all the right the lessors had, viz. the equity of redemption, it may be, that if he came forward and received the rents, some other

(a) 4 B. & Ald. 684.

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plea of this nature might have been framed to meet the case. However, the present plea is wholly insufficient for the defendant's purpose; for, as the whole estate the corporation had as lessors was a reversion expectant on their mortgages for years, all that Parr could take by the *elegit* against them would be their right to that reversion, without any power to enforce that right, whatever it might be, by ejectment. I doubt if the case of tenant by *elegit* is like that of a second mortgagee. But taking Mr. *Barstow* to be right, it fails to apply to this case, for the recitals of the first mortgage in the second gave full notice to the second mortgagee. If the second mortgagee may in any case recover in ejectment, notwithstanding the first mortgage, that may be because the parties are estopped by their own deeds. But if the first mortgage was set out, and the deeds shewed that the second mortgagee took no more than the first had left to him, he would not succeed. Whatever might have been the result on other pleadings, no verdict can be entered for the defendant on these issues.

ALDERSON, B.—I am of the same opinion, on this short ground:—the defendant's plea rests his case on Parr's title as paramount under the *elegit*, but also shews that the mortgagees of the lessors were entitled to that immediate possession of the premises, which the defendant undertakes upon these issues to prove to be the right of Parr. Whether the facts proved amounted to an expulsion, must depend on the title which is pleaded; now what is added to that title in evidence is, that, after it accrued, the present defendant attorned to Parr. But as no title in Parr to eject him is shewn, that attornment does not establish any expulsion.

ROLFE, B.—In this action for rent, the plea sets up a prior title in Parr under an *elegit*, and states the inquisition, and the finding of the jury, that the markets of which

the lessors were possessed were subject to two terms for years, vested by them in certain mortgagees. Thus the corporation had legal title to the reversion, with power in equity to pay off the incumbrances. The plea also states that the sheriff delivered the demised premises to Parr under the *elegit*, and that by *virtue* of the delivery aforesaid, Parr entered and expelled the defendant. This bound the defendant to prove that Parr did enter and evict by virtue of that *elegit*. I doubt if that must necessarily mean that he entered and dispossessed the defendant by the forms of an ejectment, for the party might yield without that pressure if he chose. But the defendant was bound to shew that Parr, the party claiming, had such a title as conferred a right to eject him. Now it is clear Parr had no such title, having only a reversion expectant on two terms for years.

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PLATT, B.—Since 29 Car. 2, c. 3, s. 10, the writ of *elegit* reaches as well the equitable interests of the debtor, being a *cestui que trust*, as by 13 Edw. 1, c. 18, it did his freehold interests. Then the only change worked by 1 & 2 Vict. c. 110, s. 11, in cases not affected by the proviso at the end, is that the subject matter of the execution is altered to the whole instead of a moiety of the lands. Then title must be made out in Parr to support this plea. The defendant says, I cannot pay this rent, because I have been evicted by Parr; had he pleaded that a stranger had evicted him, it would have been a bad plea. But this plea seems no more; for Parr's title appears by the inquisition, which describes the previous title, shewing that the lessors at the time of letting had only a reversionary interest. To make the title good, as pleaded, the eviction should have been by a party having a right at the time to recover in ejectment. But how could these reversioners have a right of entry at the time of the transaction relied on as an eviction?

Rule discharged.

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June 8.

DOE *d.* EDWARD LLOYD, Lord MOSTYN, and Others *v.*  
THOMAS JONES.

Lessee for lives of a farm inclosed from an adjoining extra-parochial waste, over which there was a right of common in respect of his farm, some small pieces of land near but not actually contiguous to the farm. The lessor was not lord of the waste:—*Held*, that, in the absence of evidence shewing a contrary intention, it was to be presumed that the lessee made the inclosures for the benefit of his lessor, to belong to him as part of the farm at the determination of the lease.

*Held*, also, that such presumption was not rebutted by the fact that the lessee, during the lease, made a conveyance of these inclosures to

his son in fee, which, however, was not delivered, nor followed by any possession.

By writing indorsed on the lease, the lessee agreed that all inclosures made by him upon the said waste should be surrendered up to the lessor, his heirs, &c. at the end of the lease, and that the lessee should pay to the lessor, his heirs, &c. the sum of 6*d.* annually, as an acknowledgment for the same:—*Held*, that this was an admission on the part of the lessee that he had made the inclosures for the benefit of the lessor.

**EJECTMENT** to recover a cottage and several pieces of land in the extra-parochial place of Threapwood, in Flintshire. The pieces of land were numbered 4, 5, 6, 7, 8, 9, & 10, in a map or plan annexed to the case.

At the trial, before *Coleridge, J.*, at the Flintshire Summer Assizes, 1844, a verdict was found for the plaintiff, subject to the opinion of the Court, on the following case:

By indenture of demise, dated the 15th of October, 1756, made between Edward Lloyd, afterwards Sir E. Lloyd, Bart., of the one part, and Richard Jones of the other part, the said E. Lloyd demised to R. Jones, his heirs, executors, &c., Threapwood Farm, in the parish of Worthenbury, in Flintshire, together with certain closes of about 104 acres, for the lives of the said R. Jones, Anne his wife, and Thomas Jones their son, and the life of the survivor, subject to the payment of a yearly rent.

Threapwood Farm in part adjoins the extra-parochial place of Threapwood, which consists entirely of a common, of considerable extent, over which the occupiers of Threapwood Farm, and of other farms in the parish of Worthenbury adjoining thereto, have rights of common. Sir R. Puleston, Bart., is lord of the manor of Worthenbury. After the granting of the above lease, R. Jones, the lessee, from time to time inclosed small portions of the waste of Threapwood (*a*); and by writing indorsed upon the said

(*a*) The plan shewed that none of the inclosures actually adjoined the lands of Threapwood

Farm; they were separated from them by an intervening road.

indenture of lease, signed and sealed by Sir E. Lloyd and the said R. Jones, and duly attested and stamped, dated the 24th of August, 1778, reciting that since the granting of the said lease, an inclosure had been made out of the common of Threapwood, of about two acres of land, over and against the premises demised, it was thereby agreed by the said parties, that the said inclosure should be deemed and taken as part of Threapwood Farm, and that the same should be occupied and enjoyed by the said R. Jones, his executors, administrators, and assigns, during the lives contained in the said indenture, at the yearly rent of 6*d.*, to be paid by the said R. Jones, his executors, &c., to Sir E. Lloyd, his heirs, &c. And the said R. Jones did, for himself, his *executors*, &c., covenant with the said Sir E. Lloyd, that he, his executors, &c., should pay to Sir E. Lloyd, his heirs, &c., the said rent of 6*d.* when demanded, and also to maintain the fences and ditches of the said inclosure; and likewise to deliver up the same well fenced and ditched at the end or sooner determination of the said term, to the said Sir E. Lloyd, his heirs and assigns. The inclosure of two acres, mentioned in this indorsement, has since been divided into, and now forms, the two pieces numbered 4 and 5 on the plan.

By another writing, indorsed on the said lease, signed and sealed by Sir E. Lloyd and R. Jones, and duly attested and stamped, dated the 27th of November, 1793, it was agreed between the said Sir E. Lloyd and R. Jones, their heirs, &c., that a house built by the said R. Jones on Threapwood, and all inclosures then already made upon Threapwood, or which thereafter should be made upon the said common by the said R. Jones, should be surrendered up to the said Sir E. Lloyd, his heirs, &c., at the end of the said demise; and that the said R. Jones, his heirs and assigns, should repair the said house, then in the occupation of Thomas Mullock, and that he, the said R. Jones, his heirs, &c., should pay to the said Sir E. Lloyd, his heirs, &c., the sum of 6*d.* annually, as an

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acknowledgment for the same. The house mentioned in this latter indorsement is the cottage and outbuildings sought to be recovered in this action, and is marked No. 8. Numbers 7 and 8 were inclosed by R. Jones, the lessee, before 1783. The house was built about 1785, and numbers 6, 9, and 10, were inclosed about the same time.

By indentures of lease and release, of the 1st and 2nd of May, 1792, made between the said R. Jones, the lessee, of the one part, and Richard Jones, his son, of the other part, R. Jones the elder bargained, sold, &c., to R. Jones the younger, all that messuage &c. of the said R. Jones the elder, being in Threapwood aforesaid, in the occupation of T. Mullock. No proof was given what premises, if any, were in the occupation of T. Mullock, nor was any proof given that possession followed these deeds, or that the deeds were delivered to the grantee. R. Jones, the lessee, continued in the occupation of Threapwood Farm until his death in 1804. It was then occupied by his son Richard until 1822, and afterwards by other members of his family until 1837, when the lease was determined by the death of Thomas Jones, the last cestui que vie. Of the other inclosures R. Jones, the lessee, retained possession until his death in 1804, when they were afterwards occupied, together with Threapwood Farm, by R. Jones the younger, until his death in 1822. On his death, T. Jones, the cestui que vie, obtained possession of them, and in 1824 he recovered possession by ejectment of the cottage and an inclosure held by one Edwards, who had been put into possession by R. Jones, the lessee. T. Jones recovered as heir-at-law of his father and of his brother R. Jones. The lessor of the plaintiff, Lord Mostyn, is heir-at-law of Sir E. Lloyd, and the defendant is heir-at-law of T. Jones, the cestui que vie. No evidence was given of any payment of the rents made payable by the indorsements of the 24th of August, 1788, and the 27th of November, 1793.

The question for the opinion of the Court is, whether the lessor of the plaintiff, Lord Mostyn, is entitled to

recover all or any part of the premises in question. If the Court should be of opinion that he is so entitled, the verdict for the plaintiff is to stand, and to be entered for such of the premises as he is entitled to recover. If the Court should be of a contrary opinion, the verdict is to be entered for the defendant.

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*Jervis*, for the lessors of the plaintiff.—There are two points in this case, on either of which the plaintiff is clearly entitled to succeed. First, the inclosures made from Threapwood Common by Richard Jones, the lessee of Threapwood Farm under the lease of 1756, are to be presumed, under the circumstances, to have been made for the benefit of his lessor, and to belong to him as part of the farm at the determination of the term. It is found in the case that there was a right of common over this waste in respect of Threapwood Farm. Although it was once doubted, it is now established by many authorities, that if a lessee inclose land contiguous to his farm, he is presumed, in the absence of facts to shew a contrary intention, to have inclosed for the benefit of his lessor: *Doe d. Challnor v. Davies* (a), *Doe d. Colclough v. Mulliner* (b), *Bryan d. Child v. Winwood* (c), *Doe d. Lewis v. Rees* (d). And in this case there was no fact to rebut this presumption. It may be said, that, in *Bryan v. Winwood*, the landlord of the farm was also the lord of the waste; but that was not so in *Doe d. Lewis v. Rees*. [*Alderson, B.*—There was a case before me at the last Spring Assises, in which also the encroachment was upon a stranger.]

Secondly, these inclosures were all made before the year 1785, and two of them before the year 1778. Now, by the first indorsement on the lease, made in 1778, the lessee *admitted* that he made them for the benefit of his landlord; and the others are similarly affected by the second indorse-

(a) 1 Esp. 461.

(b) *Id.* 460.

(c) 1 Taunt. 208.

(d) 6 C. &amp; P. 610.

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ment, made in 1785. All that can be said on the other side is, that no rent has been paid in respect of these inclosures, and that the defendant has therefore acquired a title to them by lapse of time. [*Alderson, B.*—They have become part of the farm: non-payment of rent is immaterial.] Besides, *Doe d. Davy v. Oxenham* (a) is a distinct authority that a lessor is not barred by omitting to receive rent from his lessee during the continuance of the lease. With respect to the conveyance by Richard Jones to his son, that was not delivered, and could not operate to the prejudice of his lessor.

*Townsend*, for the defendant.—This is not the case of an *annexation* to the farm; these pieces of land were held as a separate inclosure. It is, however, still *vexata quæstio* to whose benefit an inclosure made by a tenant shall enure, and the question has never been fully considered in banc. The case of *Doe d. Lewis v. Rees* is very shortly reported; and there, the encroachment being upon the sea-coast, it would be presumed to belong to the owner of the adjacent soil, not to the lord of the manor: *Lowe v. Govett* (b). In *Doe d. Colclough v. Mulliner*, Lord *Kenyon* ruled, that an encroachment by the tenant on the waste did not belong to his landlord, and is reported to have revolted at the idea that the tenant could make his landlord a trespasser, which he said would unavoidably be the case if the latter could recover in the ejectment. [*Alderson, B.*—The answer to that is, that the presumption may be rebutted by the repudiation of the landlord, as well as by the acts of the tenant.] In *Doe d. Challnor v. Davies*, again, *Thompson, B.*, expressed a similar opinion. *Bryan v. Winwood* is distinguishable, because there the landlord of the farm was also the owner of the waste. There are also some still more recent cases, which are distinguishable from the pre-

(a) 7 M. &amp; W. 131.

(b) 3 B. &amp; Adol. 863.

sent. In *Doe d. Lord Dunraven v. Williams* (a), as in *Bryan v. Winwood*, the lessor of the plaintiff was the lord of the manor. In *Doe d. Harrison v. Murrell* (b), the encroachment was absolutely annexed to the farm. No difficulty exists in applying the principle contended for on the other side, where the lessor is also the owner of the waste encroached upon; then the landlord's land is taken for the landlord's benefit; but there is no reason why the landlord should have the benefit of an encroachment upon a stranger, when he has no interest whatever in the soil.

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But, secondly, there are facts in this case to shew that here the lessee inclosed for his own benefit. By the first indorsement on the lease, the land is to be occupied by the lessee and his *executors*, which distinguishes it from freehold estate, and at a separate rent. [*Pollock*, C. B.—It is a mere mistake in using the word “executors” instead of “heirs.” *Alderson*, B.—Is not this indorsement really equivalent to saying—“Memorandum, I have inclosed for the benefit of my landlord?” Besides, though the land inclosed was not the landlord's, he had a right over it, and therefore could have stopped the inclosure. *Rolfe*, B.—Any admission which the tenant makes that he holds for a term of years under his landlord is very good evidence of title.] At all events, the inclosure made after the first indorsement did not pass to the landlord, by reason of the conveyance of 1792, which was made for a valuable consideration, before the execution of the second indorsement. [*Pollock*, C. B.—The indorsement operates not by way of *conveyance*, but by way of *admission*. Suppose a tenant holds premises in apparently adverse possession for eighteen years, and in the nineteenth year conveys them to his son, and in the twentieth attorns to his landlord, would the conveyance give any interest to the son? *Alderson*, B.—Besides, the case finds that no possession followed that deed, and that

(a) 7 C. &amp; P. 332.

(b) 8 C. &amp; P. 134.

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there is no proof of its delivery.]—There may be a sufficient delivery, though the deed remain in the possession of the grantor: *Shelton's case* (a). Further, the second indorsement merely purports to be a surrender, and is to be read as such, and the tenant may shew that it was not a voluntary one.

*Jervis* was not called upon to reply.

POLLOCK, C. B.—I think the plaintiff is entitled to our judgment. If there had been no indorsement in the case, but it had been proved that the landlord had asked the tenant what he was doing, and he had answered, “I am making these inclosures for your benefit,” would not that have been sufficient?

ALDERSON, B.—The presumption of law being that the tenant incloses for the benefit of his landlord, it is for the defendant to rebut that presumption. Does he rebut it, by shewing a secret conveyance by the tenant to his son, which is not followed by possession? All the public and open acts which appear in this case are such as would induce the landlord to suppose that the presumption was applicable; and the conveyance affords no answer to it.

ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

(a) Cro. Eliz. 7.

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## STEADMAN v. ARDEN.

June 19.

**THIS** was an action for money had and received, brought by the plaintiff, who was an allottee of shares in the Dublin and Armagh Railway Company, against a director of the company, to recover back the amount of the deposit paid by the plaintiff upon his shares, on the ground of the failure of the undertaking. A rule had been obtained on the part of the plaintiff, calling upon the defendant to shew cause why the plaintiff or his attorney should not be allowed to inspect and take a copy of the subscribers' agreement and parliamentary contract, upon an affidavit which stated that these documents were signed by both the plaintiff and the defendant, that they were in the hands of the solicitors of the company, and that an inspection of them was necessary to the plaintiff for the purpose of framing his case.

In an action by an allottee of railway shares against a member of the provisional committee, to recover back his deposit, the Court ordered that the plaintiff should have an inspection and copy of the subscribers' agreement and parliamentary contract, which both the plaintiff and the defendant had signed, and which were in the hands of the solicitors of the Company; the plaintiff's affidavit stating that an inspection of them was necessary to him for the purpose of framing his case, and the defendant not shewing that they were not within his power or control.

*Bramwell* shewed cause.—The plaintiff does not shew by his affidavit in what way the inspection of these documents is necessary to his case, and it is difficult to see how it can be necessary for the purpose of such an action as this. It would seem as if he wishes to find out from them whether he really has a cause of action or not. [*Alderson*, B.—He is a party to the documents, and has an interest in them. *Pollock*, C. B.—The subscribers' agreement is the contract on which his money was paid. For aught we know, it may contain an agreement, that if the directors do not go on with the undertaking, they will return the money on a given day.] The reason for which an inspection of the deed is sought should be stated in the affidavit: the purpose mentioned, of "framing the plaintiff's case," may mean many things. [He cited *Mayor of Arundel v. Holmes* (a),

(a) 8 Dowl. P. C. 118.

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good health, with an averment that the said declaration was in all respects true. There were several pleas and issues joined, leaving the affirmative on the defendant. In particular, the second plea alleged that the assured "was at the time of making the policy in bad health," and concluded, as in this case, with a verification. The replication was, that he "was in good health, as in the declaration is alleged," concluding to the country. Lord *Denman* held the plaintiffs entitled to begin, on the ground that they had to establish that which is the very condition of the insurance, namely, that the party whose life was insured was in good health. That averment required to be proved, as there is no presumption of good health, and the plea merely denied the declaration. In *Ridgway v. Ewbank* (a), in an action on a charter-party, the issues were, "that the defendant did furnish sufficient cargo," and "that the plaintiff refused, after notice, to receive the cargo offered," and the plaintiff was held entitled to begin. The plea concluded to the country. [*Alderson*, B.—The mere conclusion of the plea does not afford the required test. It should be remembered, that if no evidence was given for the plaintiffs, the defendant would be entitled to the verdict without giving any.] The reasons given in the judgment of the Court of Queen's Bench, in *Mercer v. Whall* (b), apply strongly here. See also *Sowell v. Champion* (c), *Stavers v. Curling* (d), 2 Marshall on Insurance, 775; Com. Dig. tit. Pleader (D. 1).

POLLOCK, C. B.—I am of opinion that the rule for a new trial should be made absolute. The policy contained a statement or declaration by the assured, that certain matters were true, and the validity of the policy depended on the truth of those matters. The plaintiffs averred, in the count,

(a) 2 M. &amp; Rob. 217.

(b) 5 Q. B. 458.

(c) 6 Ad. &amp; E. 407.

(d) 3 Bing. N. C. 355.

that the statement or declaration made by the assured was true. I think that, had only non-assumpsit been pleaded in an action of this kind, before the New Rules, the plaintiffs must have given some evidence, though slight, of the truth of that declaration (a). Now the object of the New Rules was, to give specific notice of that which it is intended to rely on at the trial, and these pleadings are subject to those rules. The plea, in substance, negatives one of the statements made in the declaration contained in the policy; so that the defendant might have taken issue by concluding to the country, instead of negating it and concluding with a verification. But that does not alter the substance of the plea; and its being an informal traverse, open to special demurrer, had the plaintiff so chosen (b), makes no substantial difference as to the right to begin. The plaintiffs having alleged in their count a statement which they averred to be true, and which was in substance denied to be so by the defendant, it appears to me that the plaintiffs were bound to give some evidence of the truth of it. *Geach v. Ingall* (c) is expressly in point to shew that the plaintiffs ought to have begun with that evidence, unless the fact in this case, that the traverse in the plea concluded with a verification or an averment, and not to the country, makes any such difference as to cast the onus of proof on the defendant instead of the plaintiffs. And, after the best consideration I can give to the question, it appears to me that no such difference is made. For whether the issue is taken on a simple traverse in the plea, or by *de injuriâ* replied to a like traverse pleaded with a verification, the substance is the same; and the plaintiffs, having stated in their count matter of which they are bound to give some evidence, and which the plea does not admit, have a right to begin. The

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(a) See per Lord Abinger, 3 M. & W. 95.  
M. & W. 510, in *Huckman v. Fernie*; and *Geach v. Ingall*, 14 (b) 2 Saund. 190, n. (5).  
(c) 14 M. & W. 95.



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other question then arises, what is to be the effect of that right having been taken from the plaintiffs by the learned judge at the trial? It unhappily still remains of great importance to the administration of justice by a jury, that the right to begin should be correctly adjudicated on; for all who are conversant with those trials at *Nisi Prius*, in which the address of counsel may materially affect the result, well know that the issue often ultimately depends on the decision of the question, which party has a right to begin. And in such cases, the erroneous ruling of a judge on that subject should be corrected by the Court in *banc*. The increasing intelligence of juries may, ere long, render motions on this ground needless; but we cannot yet affirm that any erroneous impressions created in their minds in the course of a cause can be easily set right by the summing up of the judge. In some cases the right to begin may properly be matter for the judge's discretion, while there are others in which it is of the utmost importance that the suitor, who, in point of practice, has the right to begin, should exercise that right accordingly. It appears to me, that, in this case, the plaintiffs were entitled to begin; but that, by miscarriage at *Nisi Prius*, they were deprived of that right; and we think it possible that their case may have been injuriously or materially affected in consequence. We therefore think that there ought to be a new trial, in order that they may fully exercise that right.

ALDERSON, B.—I am also of opinion, on the whole, that this rule should be made absolute. The plaintiffs' declaration avers the truth of a statement or declaration made by the assured to the insurance office, as the basis of the contract with them. The plea, in truth, raises an issue which amounts to no more than this:—Whereas you, the plaintiffs, have alleged that the whole of this statement or declaration to the insurance office is true, admitting the greater part of it to be true, I, the defendant, put you to prove the

truth of that part of it in which the assured alleged that he was not, at the time this assurance was effected, afflicted with rupture. But that is an issue, the first assertion of which was made by the plaintiffs. The defendant has contradicted what the plaintiffs affirmed, and the real issue is, whether what they have so affirmed is true. If it be true, it is for the plaintiffs to prove its truth; so that the only difficulty in the case has arisen from the manner in which the defendant has pleaded, by concluding with a verification instead of to the country. The case of *Geach v. Ingall* would have been exactly in point, had the plea concluded to the country; and I do not think that the mere form of the issue alters the matter, as the substance of the plea remains the same. Availing myself of *Rawlins v. Desborough* as an authority for looking not to the form but the substance of the pleading, in determining on the right to begin, I think that, though the plea concluded with a verification, and the plaintiffs took issue on it by replying *de injuriâ*, the proof of the issue is in truth not on the defendant, but on the plaintiffs. Then the plaintiffs were entitled to begin at *Nisi Prius*.

But with respect to the other point, whether we ought to grant a new trial on the ground that the plaintiffs were prevented from beginning, I have had much doubt. For though I agree in the observations of the Lord Chief Baron as to the advantage derived in some cases from beginning, it appears to me that a larger amount of proof has in this case been thrown on the defendant than there ought to have been; for, in my view of it, all he was bound to do was to shew it to be doubtful whether the plaintiffs' statement to the office was true; whereas the jury was here called on to find for the plaintiffs, unless the defendant shewed the declaration to be untrue; thus giving the plaintiffs a greater advantage than it appears to me they were entitled to. Yet they complain of the course taken at the trial, on the

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ground that that advantageous position was more than counterbalanced by losing the advantage of being heard by their counsel at the beginning and the end. I feel much doubt on this point; for if juries are improving, the intervening stage of transitus in that improvement is the most dangerous of all. Whilst they were completely uninformed, they would be guided by the judge's opinion. However, on the whole, I think the rule must be absolute.

ROLFE, B.—I am of the same opinion, though I concur in it with extreme reluctance; for I consider it a sort of scandal to the administration of justice that the question of the right to begin at Nisi Prius should ever be made per se a ground for granting a new trial. I should have thought it much better if the Courts had laid down some general rule that the discretion of the judge on such a point should be conclusive; for if, from the one party beginning instead of the other, or from other causes, the verdict was unsatisfactory to the judge, and afterwards to the Court, a new trial would then be granted. It seems to me, that if the evidence is satisfactory, there is no more ground for granting a new trial because the plaintiff begun or the defendant begun, than because the cause was taken late, when every one was tired, or for many other like reasons. But that is merely a present opinion of my own; and I must say, that, where the proper course of trial has not been taken, and injustice may have been done thereby, the Court is bound to interfere. Was this, then, a case in which the plaintiffs had a right to begin? and if they had that right, and have been prevented from exercising it, ought this Court to interfere to enforce it by granting a new trial? Though I at first doubted whether the plaintiffs were entitled to begin, the argument has convinced me that they were. They aver in their declaration, that the statement made by the assured to the office was true; and

the policy shews that the truth of that statement was a condition precedent, which the plaintiffs were bound to aver and make out by evidence, before they could be entitled to recover. By averring that that statement was true, they aver, in substance, that the assured had not been afflicted with spitting of blood, rupture, &c. Now the defendant's answer is, in substance, that that statement was not true, for that he had had rupture. That, I apprehend, threw the right or onus of beginning to address the jury in the first place on the plaintiffs; and if so, there should be a new trial; for in this case, the contrary course which has been taken may very probably have worked some injustice to them.

PLATT, B.—I agree that there ought to be a new trial. I am not adverse to applications of this nature; for I think it of the last importance that the discretion of a judge, as exercised at Nisi Prius, should be most extensively revised by the superior wisdom of the Court from which the record emanates; and that any misdirection of his, by which injustice is worked, whether by placing a party in an unfortunate position from not having his case properly discussed before the jury, or in any other matter, should be equally subject to the jurisdiction of that Court. Personally, I feel great satisfaction in knowing that whatever I may do at Nisi Prius is open to revision elsewhere. The basis of this action is the truth of the statement made to the office; accordingly, the plaintiffs aver that statement to have been true. The defendant, in substance, negatives that averment, and puts the plaintiffs to prove it to be true; thus making it the substantial question in the cause whether the statement which was the basis of the contract was true. Where real damages are sought to be recovered at Nisi Prius, every one of any experience knows what the effect of the first and last word is; so that, as the

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plaintiffs were entitled to begin, but did not, I think a new trial should be granted.

Rule absolute accordingly (a).

(a) See *Booth v. Millns*, post.

June 8.

RIGGE v. BURBIDGE and Others.

In an action for the stipulated price of a specific chattel, the defendant pleaded payment into Court of a sum which the plaintiffs took out in satisfaction of the cause of action:—*Held*, that the defendant in that action was not estopped thereby from suing the plaintiffs for negligence in the construction of the chattel.

CASE. The declaration stated, that the plaintiff was possessed of a certain dwelling-house, situate &c., and was desirous of causing to be erected therein a certain kitchen range; that the defendants, being manufacturers of kitchen ranges, were employed by the plaintiff in that behalf, and were paid by him in that behalf the sum of £42; and that it became and was the duty of the defendants to use due and proper skill in the constructing of the said range. Breach, that the defendants did not use due and proper skill, &c., but, on the contrary, constructed a kitchen range which was insufficient and improper for the purpose, &c.

Plea, that the plaintiff ought not to be admitted to allege that the defendants did not use due and proper skill in constructing the said range, &c.; because they say, that, after the said supposed grievances committed by the defendants, as in the declaration mentioned, the now defendants commenced an action against the now plaintiff for constructing the said range, and for the price thereof, and declared against the said now plaintiff for the price of goods sold and delivered, and for work and labour, &c. &c.; that the now plaintiff pleaded in the said action payment into court of the sum of £42, which sum the now defendants took out of court in full satisfaction of the damages and causes of

action; that the causes of action in the said declaration were in respect of the price and value of the same kitchen range, and of fixing the same, whereof the plaintiff hath now complained that the defendants did not use due and proper skill in constructing the same: wherefore they pray judgment if the plaintiff ought to be admitted to say that the defendants did not use due and proper skill in constructing the said range. The declaration proceeded to allege special damage.

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Special demurrer, assigning for cause, that the fact of the now plaintiff having paid money into court, in the said action brought by the now defendants, is no answer to the action now brought by the plaintiff for want of reasonable care in making and erecting the said range. Joinder in demurrer.

*Cleasby*, in support of the demurrer.—This plea is an utter misapplication of the doctrine of estoppel. How can the mere fact of the plaintiff's having paid money into court in a former action for the price of this article, prevent him from bringing an action for special damage, for negligence in constructing it? The plaintiff could not have alleged the negligence as an answer to that action:—The Court then called upon

*Currington*, contra.—This plea is properly pleaded by way of estoppel. The correct rule on this subject is laid down in *Mondel v. Steele* (a), and *Thornton v. Place* (b). According to those cases, the plaintiff was entitled to deduct in the former action the sum which it would have cost to put the range right. *Fisher v. Samuda* (c) appears to be an authority for the proposition, that where an action has been brought for the value of goods supplied at a stipulated price, and the buyer does not, either in bar of the

(a) 8 M. & W. 858. (b) 1 M. & Rob. 218. (c) 1 Campb. 190.

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action or in reduction of the damages, object to the quality of the goods, but lets the seller recover a verdict for the full price agreed upon, he cannot then maintain a cross action on the ground of the goods being of good quality, or unfit for the purpose for which they were ordered.—He cited also *Farnsworth v. Garrard* (a).

POLLOCK, C. B.—The plaintiff is clearly entitled to our judgment. Unless the plea amounts to an estoppel, it is admitted that it affords no answer to the action; and it certainly is no estoppel.

ALDERSON, B.—I am of the same opinion. Formerly, when an action was brought for the price of work agreed to be done at a stipulated rate, the defendant was not allowed to make any deduction from that stipulated price in respect of the plaintiff's having failed properly to perform his contract, but was driven to his cross action for the breach of it. In this respect the law is now settled otherwise by the case of *Mondel v. Steele*. But the present plaintiff may maintain an action against the defendants for negligence in the performance of the work, unless his defence to the former action, for the price of the goods, had been to shew that the work and goods were of no value whatever to him. That certainly was not the case here.

ROLFE, B.—I am of the same opinion. It does not at all appear that the defence of the present plaintiff to the former action, for the price of these goods, included the damage sustained by him for the improper working of the range.

PLATT, B.—The plaintiff paid into court, as defendant in the former action, the price of the work and labour and

(a) 1 Campb. 38.

goods, and he is now clearly entitled to his remedy against the then plaintiffs for the special damage which he has sustained by their unskilful erection of the range.

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Judgment for the plaintiff.

TARTE v. DARBY and Another.

June 11.

**C**ASE for distraining the plaintiff's goods for an alleged arrear of rent, no rent being due: with a count in trover. Plea, not guilty, by statute.

At the trial, before *Tindal*, C. J., at the last Warwick Assizes, it appeared that one Robert Mountain had been tenant, first to a Mr. Maybury, since deceased, and afterwards to the defendants, who were the executors of Maybury, of a messuage and premises at Westbromwich; and that on the 28th October, 1843, the following written agreement was entered into between the defendants, Mountain, and the plaintiff:—

“An agreement entered into the 28th day of October, 1843, between Robert Mountain, of Westbromwich, of the first part; Thomas Darby and William Darby (the defendants), both of Westbromwich aforesaid, of the second part; and James Tarte (the plaintiff), of Birmingham, provision-dealer, of the third part. Whereas the said Robert Mountain holds and rents of and under the said Thomas Darby and William Darby, a messuage or dwelling-house,

On the 28th October, 1843, the plaintiff, the defendant, and M., entered into an agreement, by which, after reciting that M. was tenant to defendant of a house, at a rent of £25 a year, and had agreed to let it to plaintiff at a rent of £20 a year, from 24th June, 1844, at which time defendant agreed to exonerate M. from his tenancy on his paying all rent up to that day, and to accept plaintiff as tenant from that period at the said rent of £20 a year; M. agreed to let

and plaintiff to take the house, from the date of the agreement to the 24th June then next, at the rent of £20 a year; and M. agreed to find all materials, except lath, to put up a partition-wall, &c., plaintiff finding lath and labour. And plaintiff agreed to take the house of defendant from the 24th June at the rent of £20 a year, and to give or take six months' notice to quit the premises; and defendant agreed to exonerate M. from his tenancy on the said 24th June, on his paying up all rent due to that time. Immediately after the execution of this agreement, M. let plaintiff into possession of the premises. On 4th March, 1844, defendant agreed to sell the house to the plaintiff, but this agreement was not carried into effect:—*Held*, first, that the instrument of 28th October, 1843, amounted to a lease of the premises by defendant to plaintiff from 24th June, 1844; secondly, that it was not affected by the subsequent agreement for the sale of the premises.



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situate at Mares Green, in Westbromwich, with the out-buildings thereto, at the rent of £25 per year, payable quarterly; and whereas the said Robert Mountain hath agreed with the said James Tarte to under-let the said house and premises to him the said James Tarte, from Monday next, at and under the rent of £20 per year, until the 24th day of June next, at which time the said William and Thomas Darby agree to exonerate the said Robert Mountain from his tenancy, on his paying all rent up to the said 24th day of June next, and to accept the said James Tarte as tenant from that period, at the said rent of £20 per year, payable quarterly, and under the further provisions hereinafter mentioned. Now therefore the said Robert Mountain agrees to let, and the said James Tarte agrees to take, the said premises from this time till the 24th day of June next, at the rent of £20 per year, free of all deductions, the said rent to be payable quarterly, and such rent to commence from Monday next, a proportionate rental paid on the 25th day of December next. And the said Robert Mountain agrees to find all materials, except lath, to put up the partition wall, and make good the ceiling, he the said James Tarte finding lath and labour. And the said James Tarte agrees to take of the said William Darby and Thomas Darby the said messuage and premises, from the said 24th day of June next, at the yearly rent of £20 per year, payable quarterly, free of all deductions, and to give or take six months' notice previously to giving up the said premises. And the said Thomas and William Darby agree to exonerate the said Robert Mountain from his tenancy on the said 24th day of June next, on his paying up all rent due to that time after the rate of £25 per year. As witness the hands of the said parties:

“ ROBERT MOUNTAIN, × his mark.

WILLIAM DARBY. THOMAS DARBY.

JAMES TARTE.”

Immediately after the execution of this agreement Mountain let the plaintiff into possession of the premises. The plaintiff shortly afterwards applied to the defendants for the purchase of them, and the following agreement was entered into for that purpose; which was proved to have been signed on the 4th of March, 1844:—

“We, the undersigned, executors of the late Mr. Silvanus Maybury, agree to sell to Mr. James Tarte the property now occupied by him, situate at Mares Green, in the parish of Westbromwich, in the county of Stafford, for the sum of £840. The aforesaid executors to bear the expense of the title-deeds.

“WILLIAM DARBY.

THOMAS DARBY.”

It appeared on the trial, that the testator Maybury was only the mortgagee for an unexpired term of 1000 years; for which term only, therefore, the defendants had power to sell the premises. On the 6th of April, 1844, they gave the plaintiff notice of this. The plaintiff refused to accept a conveyance of the term, and called upon the defendants to perform their contract of sale by conveying the property to him absolutely: and he continued in possession of the premises until December 1845 refusing to pay any rent. On the 20th of December, the defendants levied a distress on the premises for £20, a year's rent alleged to be due on the 24th of June preceding. It appeared that Mountain's tenancy had been regularly determined on the 24th of June, 1844, by a notice to quit.

Under these circumstances, the learned Judge was of opinion that the plaintiff, from Midsummer 1844, was tenant from year to year of the premises to the defendants; and under his direction the defendants had a verdict, leave being reserved to the plaintiff to move to enter a verdict for him for 20*l.* 10*s.*

In Easter term, *Humfrey* obtained a rule nisi accordingly, and for a new trial, on the ground of misdirection; against which

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*Whitehurst* now shewed cause.—The ruling of the learned Chief Justice was correct. The instrument of the 28th of October, 1843, was not merely an agreement for a future lease, but an actual *lease* to the plaintiff, to come into operation on the determination of Mountain's tenancy, on the 24th of June following. Until that period he was either tenant to Mountain, or had an *interesse termini* in the premises. The defendants were therefore in a position which entitled them to distrain, unless that right was affected by the subsequent agreement for the purchase of the premises by the plaintiff. This rule was moved on the authority of the case of *Dunk v. Hunter* (a), which, no doubt, established the principle that there can be no distress unless there be a contract for an actual demise, at a specific rent. The questions therefore are, first, was this instrument a contract for an actual demise; and secondly, did it subsist notwithstanding the subsequent agreement to sell? The principles applicable to the first of these questions are fully stated in the recent case of *Curling v. Mills* (b). It is there laid down, that the intention of the parties is that which is to be looked to; and that, where there is an instrument whereby one party is to give possession, and the other to take it, that is a lease, unless it can be clearly collected from the instrument itself, that it is merely an agreement preparatory to a lease to be afterwards made. Now it is clear from the nature and terms of this instrument, that it was intended finally to create between the parties the relation of landlord and tenant. It is obvious that this is so as between Mountain and the plaintiff; and Mountain, in pursuance of the previous agreement made with him, is to be exonerated from his tenancy on the 24th of June following. And the plaintiff agrees immediately to do work upon the premises, which he certainly would not do without the security of a present demise. The amount of the rent, and the time of

(a) 5 B. & Ald. 322.

(b) 6 Man. & G. 182.

payment of it, are settled by the instrument itself. It was clearly intended by all parties to operate as a present demise, from the 24th of June then next, the defendants retaining the right of distress in case of non-payment by Mountain of the intermediate rent, but the commencement of the plaintiff's tenancy not being *conditional* upon that payment. If, as is plain, it is a lease from Mountain, why should any further instrument be necessary from the defendants? It is clear all the parties had *the same intention*.

Secondly, assuming that the instrument of the 28th of October, 1843, amounted to a lease, it was not affected by the subsequent agreement for the sale of the premises. The plaintiff being in possession of the premises on the 24th of June, he then became possessed of the term to all intents and purposes: Bac. Abr. Leases, (M.); Shep. Touch. 304. How could that term, which had previously passed out of the lessor, be put an end to by the sale of the premises? That agreement was not intended by either party to defeat the term, nor was it in their contemplation that there should be a surrender of the lease in case the sale went off. *Doe d. Gray v. Stanion* (a) is precisely in point as to this part of the case. It will be said on the other side, that the plaintiff, by the agreement of the 6th of March, became tenant at will. But he was then tenant to Mountain, and the agreement clearly could not put an end to *that* term. Then, before the 24th of June, namely, on the 6th of April, it became known to both parties, that the defendants had not the estate they were supposed to have contracted to sell. Was the tenancy put an end to then? Clearly not; for the term had vested upon entry. [*Platt, B.*—The question is, to what are we to refer the entry on the 24th of June?] The law refers it to the previous lease, if it be one. If the defendants could not distrain, neither could they maintain

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(a) 1 M. & W. 701.

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use and occupation, and the premises would be wholly unproductive: *Winterbottom v. Ingham* (a).

*Humfrey*, contra.—The instrument of 28th October, 1843, operated only as an agreement for a future lease. The defendants agree to exonerate Mountain from his tenancy only on the condition of his paying the rent up to the 24th of June, which shews they did not intend it as a present lease to the plaintiff. He entered as tenant to Mountain; then, before that tenancy determined, came the agreement for the purchase, which, perhaps, made him tenant at will; but at no time was he in as tenant from year to year to the defendants. The case of *Doe d. Gray v. Stanion* shews, that a party who enters into premises under an agreement for the purchase of them, is only a tenant at will. The defendants have contracted to make a good title to the premises in fee; they cannot now take advantage of their own default, and say the plaintiff is only their yearly tenant. [*Pollock*, C. B.—*Doe d. Gray v. Stanion* is a direct authority against you as to this point.] Then the remaining question is, whether this instrument is an actual lease or not. [*Pollock*, C. B.—If it is a lease as regards Mountain, which it is clear it is, can anybody imagine that it is not a lease as regards the defendants?]

PER CURIAM (b).—The instrument is clearly a lease; and if so, *Doe d. Gray v. Stanion* is a direct authority that it was not avoided by the subsequent agreement of purchase.

Rule discharged.

(a) 10 Jur. 4, Q. B.

(b) *Pollock*, C. B., *Rolfe*, B., and *Platt*, B.

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## DRAKE v. PICKFORD.

June 10.

A RULE had been obtained, calling upon the plaintiff to shew cause why the verdict obtained by him on the trial of this cause should not be set aside, on the ground that due notice of trial had not been given. It appeared that, on the 7th of April, the defendant obtained an order for further time to plead, on the terms (amongst others) of taking short notice of trial, if necessary. On the 17th another order was obtained for further time to plead, and the defendant not having pleaded accordingly, the plaintiff on the 23rd signed judgment, which judgment, on the 28th, was set aside on payment of costs. On the 1st of May the defendant pleaded; on the 14th a replication was delivered; on the 16th the plaintiff served a demand of rejoinder; on the 19th he gave notice of abandoning his replication, and delivered a fresh replication, with a similiter added thereto. On the 21st an order was obtained by the plaintiff to try before the sheriff, and on the 23rd the issue was delivered, with notice of trial for the 28th; on which day, the defendant not appearing, the cause was taken as an undefended one, and the plaintiff obtained a verdict.

*Charnock* now shewed cause against the above rule.—The order of the 7th of April, whereby the defendant was bound to take short notice of trial, if necessary, was never vacated, and therefore remained in force on the 23rd of May. The effect of it was, that the defendant should take short notice of trial, if necessary, whenever the order to try should be obtained. [*Alderson*, B.—That part of the order was all wiped away by your judgment.] When the judgment was set aside, the parties were remitted to their former position, and the plaintiff was to give such notice whenever the cause was ripe for trial. [*Alderson*, B.—The defendant is to take short notice of trial, if necessary. How

Where a defendant is under terms to take short notice of trial, if necessary, it lies upon the plaintiff to shew the necessity of a shorter notice than the ordinary one. And where the defendant being under such terms, the plaintiff delivered a replication on the 14th of May, which on the 19th he abandoned, and delivered another with the similiter added; on the 21st obtained an order to try before the sheriff; on the 23rd delivered the issue with notice of trial for the 28th; and on the latter day tried the cause as undefended, and obtained a verdict, the Court set it aside with costs, on the ground that the plaintiff had had time to give the ordinary notice.

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could it be necessary, upon a plea delivered on the 1st of May, for a trial on the 28th?] The order for trial was not made until the 21st. [*Alderson*, B.—You might have obtained it before. You are to make out the *necessity* of short notice of trial.] *Charnock* cited *Lush's Practice*, p. 398; and *Dignam v. Ibbotson* (a).

ALDERSON, B.—A defendant is not bound, under such an order as this, to take short notice of trial, if the plaintiff can give him the ordinary notice; that is, unless he is unable to give it using reasonable diligence. Here issue was really joined on the 14th, on which day the plaintiff delivered his replication; at all events, the parties were fully at issue on the 19th, and the plaintiff might on the 20th have given the ordinary eight days' notice; or if he was really unable to do that, which does not appear to have been the case, he might have obtained the order to try before the sheriff, with the terms that the defendant should take short notice of trial. The rule must be absolute, and with costs.

The other Barons concurring,

Rule absolute, with costs.

(a) 3 M. & W. 431.

June 12.

PEYTON and Another v. Wood.

A writ of *distringas* may issue within a reasonable time after the expiration of four months from the issuing of the writ of summons.

HUMFREY had obtained a rule, calling upon the plaintiff to shew cause why the writ of *distringas* issued in this cause should not be set aside, on the ground that it had issued more than four months after the issuing of the writ of summons. The writ of summons issued 3rd November, 1845; the *distringas* was obtained 29th April, 1846.

*Bovill* shewed cause.—It is obvious that a writ of distringas may issue more than four months after the issuing of the writ of summons; for the plaintiff has the whole of the last day of the four months in which to serve the writ of summons. And *Norman v. Winter* (a), *Bromage v. Ray* (b), and *Pearce v. Swain* (c), are all authorities that it may.

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*Humfrey*, contra.—*Abbott v. Kelly* (d), and *Lemon v. Lemon* (e), are express authorities, that a distringas issued after the expiration of the writ of summons is irregular. If, indeed, a continuing writ of summons have subsequently issued, the distringas may be founded upon that. In *Norman v. Winter* there was an alias and pluries writ of summons; in *Pearce v. Swain* there was an alias. [*Alderson*, B.—But the distringas was founded upon the original writ of summons.]

POLLOCK, C. B.—The cases relied on by Mr. *Humfrey* are overruled by *Norman v. Winter*, or at all events by *Pearce v. Swain*. When the four months have elapsed, it becomes a question for the discretion of the Court, whether the distringas has issued within a reasonable time afterwards.

ALDERSON, B.—It is impossible to get over the fact, that the writ of summons may be served on the last day of the four months.

ROLFE, B.—The third section of the Uniformity of Process Act is entirely silent as to the time within which a distringas may issue.

Rule discharged, with costs.

(a) 5 Bing. N. C. 278.

(b) 9 Dowl. P. C. 559.

(c) 7 M. & W. 543.

(d) 3 Bing. N. C. 478.

(e) 2 Scott, 506.



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June 12.

THOMPSON v. GORDON.

The attorney for a defendant in a cause in this court signed an undertaking, whereby, in consideration of the plaintiff's agreeing to suspend execution on the judgment, he undertook to make an arrangement with him respecting the payment of the debt and costs, prior to the defendant's being discharged from prison on other detainers; or, in the event of the plaintiff's not agreeing to the terms offered, to inform him in sufficient time of the defendant's intended discharge, so that the plaintiff might not be deprived of his power of lodging a detainer against him:—  
*Held*, that this was not such an undertaking as the Court could enforce summarily, inasmuch as they could not measure the damages sustained by the non-performance of it.

*Semble*, the Court has power to enforce the performance by an attorney of an undertaking given by him as attorney in a cause in this Court, though he be not an attorney on the roll of this Court.

A RULE had been obtained, calling upon Mr. R. F. Long, an attorney, (but not of this Court), to shew cause why he should not pay over to the plaintiff, pursuant to his undertaking, the sum of 69*l.* 10*s.* 6*d.*, being the amount of the debt and costs in this action. The plaintiff sued the defendant in this Court, on a promissory note for 53*l.* 5*s.*; and on the proposal of Mr. Long, who was the attorney for the defendant, the plaintiff accepted a judge's order for payment by the defendant of the debt and costs, amounting to 69*l.* 10*s.* 6*d.*, upon which order final judgment was signed in May, 1845. Mr. Long then sent to the plaintiff the following letter:—

“ Sir,

Yoursel<sup>f</sup> v. Gordon.

“ In consideration of your agreeing to suspend execution upon this judgment, I hereby undertake to make an arrangement with you respecting the payment of the debt and costs prior to Mr. Gordon being discharged from prison under his present detainers; or, in the event of your not agreeing to the terms offered by me, to inform you in sufficient time of Mr. Gordon's intended discharge, so that you may not be deprived of your power of lodging a detainer against him in this action. Your reply, approving of this arrangement, will oblige.

“ I am, Sir, yours truly,

“ ROBT. FURNIS LONG.”

The plaintiff sent a reply, signifying his assent to this proposal, and accordingly forbore to charge the defendant in execution, who was discharged from prison a few months afterwards. Mr. Long, however, made no arrangement or offer of arrangement with the plaintiff for payment of the

debt and costs, nor was the plaintiff apprised of the defendant's discharge until January, 1846.

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*Petersdorff* shewed cause.—First, Mr. Long not being an attorney of this Court, the undertaking cannot be enforced against him here. In *Sharp v. Hawker* (a), the Court of Common Pleas refused to interfere to compel an attorney to pay over money which he had received as attorney in an action brought in that Court, as he was not an attorney in the Common Pleas. [*Alderson*, B.—He has signed an undertaking as attorney in the cause in this Court. Has he not thereby given us jurisdiction? We cannot allow him to practise in this Court without authority, and then throw off his responsibility.] Secondly, here is no engagement to pay over money, but merely to make an arrangement, or furnish information. The Court has no means of measuring the damages sustained by the non-performance of it.

*T. Jones*, contra.—The Court will interfere to compel the attorney substantially to perform his undertaking, by paying over the debt and costs, which have been lost altogether by his non-performance of it.

PER CURIAM.—This is merely an engagement, either to offer some terms of settlement, or, if the plaintiff does not agree to them, to give him information when the party is about to be discharged from prison: it is not an engagement to pay. It is clearly the subject of an action only; the Court have no means of ascertaining what is the amount of damage received by the plaintiff. He may bring his action, and then the jury will say how much the custody of the debtor was worth,—perhaps it was the whole debt, perhaps nothing.

Rule discharged, without costs.

(a) 3 Bing. N. C. 66.

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June 12.

Ex parte FOULKES.

Under the 8 & 9 Vict. c. 127, s. 1, a party may be imprisoned for non-payment of a debt not exceeding £20, due upon a judgment, although the judgment-debt originally exceeded £20.

A warrant of commitment under that act, by the judge of the Palace Court, ordered that a defendant should be committed for the term of twenty days to the common gaol wherein debtors under judgment and in execution of the superior courts of justice may be confined in the county of Surrey; and was directed to H. H., an officer of the said court, and to the keeper of the debtors' prison above mentioned, for the county of Surrey; and the defendant was imprisoned under it in Horsemonger-lane Gaol, being the only debtors' prison for the county of Surrey.

*Held*, first, that the warrant was properly directed to and executed by H. H., notwithstanding s. 13 of the act, saving the right of the high bailiff of Westminster to the execution of process; secondly, that the twenty days' imprisonment began to run from the time of the defendant's being actually lodged in prison under the warrant; and thirdly, that the place of imprisonment was sufficiently designated in the warrant.

LUSH had obtained a writ of habeas corpus, to bring up the body of Thomas Foulkes, a prisoner in the custody of the keeper of the debtors' prison in the county of Surrey, in order to his being discharged, on the ground of the invalidity of the order of committal. It appeared that he had been confined, since the 8th of June, in Horsemonger-lane Gaol, which is the only common debtors' prison for the county of Surrey, under a warrant or order of committal from the Palace Court at Westminster, of which the following is a copy:—

“In the Court of her Majesty's Palace at Westminster, an inferior court for the recovery of debts. At a court held the 20th day of February, A.D. 1846, at the Court House, Westminster, within the jurisdiction of the Court. Whereas Thomas Foulkes, at the time of the application for and granting the summons hereafter mentioned, was, and now is, indebted to James Hollick Davis in the sum of 4*l.* 10*s.*, and no more, besides costs of the suit, amounting to 5*l.* 5*s.*, by virtue of a judgment obtained in her Majesty's Court of Exchequer of Pleas at Westminster, on the 8th day of November, A.D. 1845. And whereas the said James Hollick Davis did, on the 14th day of February in this present year, obtain a summons from this Court, in the form prescribed by an act for the better securing the payment of small debts, passed in the session of Parliament held in the eighth and ninth years of the reign of her present Majesty, and upon an application by him in writing according to the form given by the said act; and the said Thomas Foulkes, at the time of granting such summons, resided and was, and now resides and is within the jurisdiction of

the Court; by which summons the said Thomas Foulkes was required to appear before this Court at the Court House aforesaid this day. And whereas the said Thomas Foulkes hath been duly served with the said summons within the jurisdiction of this Court, but he hath not attended as required by the said summons, and hath not alleged a sufficient excuse for not attending. Now I do therefore order, that the said Thomas Foulkes shall be committed for the term of twenty days to the common gaol, wherein debtors under judgment and in execution of the superior courts of justice may be confined within the county of Surrey, in which the said Thomas Foulkes is now residing.

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“WILLIAM CORRIE, barrister-at-law and judge of the said Court, from the time the said summons was applied for to the present time.

“To Henry Henrick, an officer of the said court, and to the Keeper of the Debtors' Prison (above mentioned) for the county of Surrey.”

*Lush* now moved that the prisoner be discharged out of custody.—First, the warrant is bad for omitting to state that the defendant is indebted in respect of a debt which originally did not exceed £20. The stat. 7 & 8 Vict. c. 96, s. 57, took away the right of arrest on final process in cases where “the sum recovered by the action” did not exceed £20; and when the stat. 8 & 9 Vict. c. 127, s. 1, gave the power of commitment in cases where “any person is, or shall be, indebted to any other in a sum not exceeding £20, besides costs of suit, by force of any judgment obtained, or of any order for the payment thereof, or of any costs in any court,” it must be considered to have conferred the power in the same cases only from which the former statute had taken away the right of arrest, namely, cases where the judgment debt originally did not exceed £20. The two statutes are in *pari materia*. Here, however, it is quite consistent with the language of the

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warrant of commitment that the sum of 4*l.* 10*s.* mentioned in it may have been the balance of a larger sum of £100. Where the debt due by force of the judgment originally exceeded £20, the party is still liable to be taken on a *ca. sa.* issuing out of the superior courts; he ought not, therefore, in such case to be liable to commitment in execution under this act by an inferior court.

Secondly, under the 13th section of the 8 & 9 Vict. c. 127, the execution of this process belonged to the high bailiff of Westminster, and the judge of the Palace Court had no authority to delegate it to one of his own officers. That section expressly enacts, that, “until Parliament shall otherwise direct, the execution of all process issuing out of any of the last-mentioned courts, [*i. e.*, *inter alia*, inferior courts of record for the recovery of debts], the jurisdiction of which shall include the city and liberty of Westminster, or any part thereof, shall belong to the high bailiffs of Westminster.”

Thirdly, the warrant is bad for not specifying distinctly the gaol in which the party was to be imprisoned, and not being directed to the keeper of that gaol. It only directs that the party shall be committed for twenty days “to the common gaol wherein debtors under judgment and in execution of the superior courts of justice may be confined within the county of Surrey,” and the direction is merely “to the keeper of the debtors’ prison (above mentioned) for the county of Surrey.” This is altogether uncertain and informal. [*Per Curiam*.—It appears that Horsemonger-lane gaol is the only debtors’ prison in the county of Surrey.]

Fourthly, the warrant does not state from what day the twenty days’ imprisonment is to be computed. It is dated on the 20th of February last, and the party is still (on the 12th of June) a prisoner under it. [*Alderson, B.*—Surely the imprisonment is to be computed from the day when the party is lodged in gaol under the warrant.] That ought to be expressed in the commitment.

Fifthly, the warrant ought to have stated, in accordance with the third section of the act, that the defendant was to be imprisoned for the term therein mentioned, or until he should be duly discharged by order of the Court. In its present form, it would seem to authorize his detention for the whole twenty days, though he may have paid the debt and costs the day after his committal (a).

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POLLOCK, C. B.—I am of opinion that the prisoner is not entitled to his discharge on any of the grounds which have been stated. With respect to the first and principal point in this case, I am of opinion that the 8 & 9 Vict. c. 127, s. 1, was intended to apply to all judgment debts not exceeding the sum of £20, whether the debt originally exceeded that amount or not. That is the obvious grammatical construction of the words of the act of Parliament, and I see no reason for limiting their effect. Then as to the argument that the execution of the warrant belongs to the high bailiff, the 2nd section of the act enacts, that “every bailiff or messenger *to whom any such order shall be issued, or who shall be acting as an officer of the high bailiff of Westminster or of Southwark, in the execution of any such order to such high bailiff, shall be thereupon empowered to take the body of the person against whom such order shall be made, and all constables and other peace officers within their several jurisdictions shall aid in the execution of every such order.*” Then comes the 13th section, the object of which was to preserve the privileges of the high bailiff; but, reading that section together with the second, it is clear that it was not intended to prevent other officers of the courts, to whom the process might be directed, from executing it within the city and liberty of Westminster.

ALDERSON, B.—I entertain no doubt that a party may

(a) The learned counsel also took some formal objections to the return to the habeas corpus, but the Court amended the return *instantanter*.

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lawfully be committed and detained in custody, under this act, for a judgment debt not exceeding £20, although the sum due upon the judgment may originally have exceeded that amount. This appears to me to be plain from the words of the first section, which authorizes the imprisonment of any person who "shall be indebted in a sum not exceeding £20, besides costs of suit, by force of any judgment obtained," &c. Here the party is committed for non-payment of a debt not exceeding £20, that is to say, 4*l.* 10*s.*, due from him by virtue of a judgment obtained in this Court. And this construction leads to no absurdity. The intention of the legislature was to give a *limited ca. sa.*, in all cases where the amount of the judgment-debt did not exceed £20. The next question is, whether the process has been executed by the proper officer. I am of opinion that, under the second section, the process was properly executed by the officer of the Court who is specified in it, and to whom it is directed by name. The object of the 13th section was merely to preserve the privileges of the high bailiffs of Westminster and Southwark, but not to give to them the exclusive right to the execution of process within those jurisdictions. Then with respect to the place of the imprisonment, the defendant is committed to the common gaol for debtors in the county of Surrey, and it appears that there is but one common gaol for debtors in that county, namely, that in which the prisoner has been confined. And as to the duration of the imprisonment, I think it is clear that it begins to run from the day on which the prisoner was actually lodged in the gaol, namely, the 8th of June; he will, therefore, be entitled to his discharge on the 28th.

ROLFE, B.—I am of the same opinion. With respect to the objection, that it ought to have been stated in the warrant from what day the imprisonment was to begin, I think the act of Parliament sufficiently expresses that it is to date from the time of the debtor being lodged in gaol. It would be impossible to fix a date in all cases, because it

could not be known beforehand how long it might be before the party was apprehended. Then with respect to the amount of the debt, the words of the first section are clear and express. It begins by reciting, "that it is expedient and just to give creditors a further remedy for the recovery of debts due to them;" and then it gives the power of imprisonment in the case of any person who shall be indebted in a sum not exceeding £20, besides costs of suit, by force of any judgment. Those words are very clear, and authorize the imprisonment of the defendant, for he was indebted in a sum under £20 by force of a judgment.

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PLATT, B.—I own I was at first a good deal struck by the argument drawn from a comparison of the enactments of the 7 & 8 Vict. c. 96, s. 57, and the 8 & 9 Vict. c. 127, s. 1; but I am now satisfied that the argument is not sustainable, and that if the legislature had had the limited object contended for by Mr. *Lush*, they would have used the words of the former act, and given the power of commitment only where the sum recovered in the action did not exceed the sum of £20.

Prisoner remanded.

The Dean and Chapter of ELY v. CASH.

June 12.

THE following case was sent by the Lord Chancellor for the opinion of this Court.

The Limitation Act, 3 & 4 Will. 4, c. 27, s. 2, enacts, that no person shall bring an action to recover any land (which, by s. 1, includes *tithes*) but

King Henry the Eighth, by letters patent, dated &c., granted to the Dean and Chapter of Ely, and their successors, the manor, rectory, and parsonage of Lakenheath, in the county of Suffolk, and all tithes, oblations, &c., there-

within twenty years next after the right to bring such action has accrued to him, or some person through whom he claims:—*Held*, that this statute does not operate to prevent the tithe-owner from recovering tithes *as chattels* from the occupier, although none had been set out for twenty years; but that it is confined to cases where there are two parties, each claiming an adverse *estate* in the tithes.



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unto belonging; by virtue whereof the said Dean and Chapter have ever since been, and still are, seised in fee of the said rectory, &c. Within the parish of Lakenheath there is a large tract of land, called Lakenheath Fen, which was formerly uninclosed and common. In the reign of Charles the First, an act of Parliament was passed, under which Lakenheath Fen was partially drained, inclosed, and allotted. In the 8 Geo. 3, an act of Parliament was passed for draining lands in Lakenheath, under which the drainage of Lakenheath Fen was improved, by means whereof the fen, which had previously titheable things of very inconsiderable value, was brought into a state of cultivation, and about fifty years ago produced titheable matters of considerable value, the tithes of which were rectorial tithes. The defendant, from December 1837, to June 1841, occupied land in Lakenheath Fen, and yearly took therefrom titheable produce, the tithes whereof were rectorial and prædial, without setting out or paying the tithes of the said titheable matters. In January, 1840, the Dean and Chapter instituted a suit in Chancery against the defendant, to recover the value of the said tithes. The right and title of the Dean and Chapter of Ely to the tithes of Lakenheath Fen did not first accrue to them within twenty years next before the said suit; the said Dean and Chapter were not in possession or receipt of the profits of such tithes at any time within twenty years next before the said suit; nor was any acknowledgment of their title to the tithes given to them, or their agent, in writing, signed by the said defendant, or by any other person in possession or receipt of the profits of the said tithes, at any time within twenty years next before the said suit. In opposition to the claim of the Dean and Chapter, the defendant relied upon and pleaded the 3 & 4 Will. 4, c. 27, an act for the limitation of actions relating to real property, and averred, that the right of the Dean and Chapter to bring an action or suit to recover the said tithes, if any, did not first accrue to

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them, or to any person through whom they claim, within twenty years next before the said suit; and that neither they, nor any persons through whom they claim, had, in respect of the estate or interest therein claimed by them, been in possession or receipt of the profits of the said tithes within twenty years next before the said suit; and that no acknowledgment of their title to the said tithes had been given to them, or their agents, in writing, signed by the defendant, or by any other person in possession, or in receipt of the profits of the said tithes, within twenty years next before the said suit. For the purposes of this case, it is to be assumed that, but for the provisions of the act of the 3 & 4 Will. 4, c. 27, the Dean and Chapter of Ely, as rectors of the rectory and parish of Lakenheath aforesaid, were entitled to the tithes of all the several titheable matters and things which have been taken by the defendant as aforesaid.

The said plea having come on for argument before the Master of the Rolls, his Lordship allowed the same; and the plaintiff having appealed from his decision to the Lord Chancellor, the latter directed that a case should be submitted to the Barons of the Exchequer for their opinion, on the following question:—Whether, in an action of debt on the 2 & 3 Edw. 6, c. 13, the plaintiffs, notwithstanding the statute of 3 & 4 Will. 4, c. 27, are entitled to recover from the defendant treble the value of the prædial tithes claimed by the Dean and Chapter of Ely in the said suit.

The case was argued on the 1st of June, by

*Martin*, for the plaintiffs.—The question to be decided in this case turns on the construction to be put upon the Limitation Act, 3 & 4 Will. 4, c. 27, as applicable to *tithes*. The first section (the interpretation clause) enacts, that the word “land” shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes.

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Then, by sect. 2, no person shall make any entry or distress, or bring an action to recover any *land* or *rent*, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to him, or to some person through whom he claims. The statute, therefore, obviously affects tithes, as an estate or interest *in the land*, and not as a chattel. In Com. Dig., Dismes (A), tithes are defined to be “an ecclesiastical *inheritance*, collateral to the land, and properly due to an ecclesiastical person.” And the stat. 32 Hen. 8, c. 7, s. 7, while it gave to the temporal courts the right of recovering tithes in the same manner as land, reserved to the spiritual courts the right of adjudicating upon tithes which should not be set out, and offerings, which are mere chattels. Tithes are an interest for which ejectment may be brought: *Baldwin v. Wine* (a), *Camel v. Clavering* (b). But this question is, in truth, already determined by the case of *Grant v. Ellis* (c), in which this Court held, that the word *rent*, which in the statute is coupled with *land*, meant therein an estate or interest in a rent, and did not apply to rents reserved on ordinary leases; the word “recover,” in the second section, meaning the same thing as “obtain possession or seisin of.” Applying the same principle to tithes, which are, for the purpose of the act, included in the word “land,” the statute is plainly confined to the estate in the tithes, and does not apply to the tithes taken—the chattel itself, which is the produce of that estate.

*Watson*, for the defendant.—The stat. 3 & 4 Will. 4, c. 27, was passed for the express purpose of quieting the possession of lands, and of all interests in and charges upon lands; and its enactments ought, for this purpose, to be

(a) Cro. Car. 301; Sir W. Jones, 321.

(b) 2 Lord Raym. 789.

(c) 9 M. & W. 113.

held to apply to all cases where there has not been a perception of tithes for twenty years. Suppose the tithe-owner had not been in the receipt of the tithes for twenty years, and in the twenty-first year they were not set out, can it be said that an ejectment would lie for them? [*Alderson*, B.—Where the tenant has not set out the tithes for twenty years, how can he be said to be in possession of them? In such a case, nobody can be said to be in possession of the tithes.] Where a rent is charged upon land, the estate in it is extinguished by non-receipt of the rent for twenty-years: *James v. Salter* (a). The interest in tithes is of the same nature. [*Alderson*, B.—The difficulty is, how has the defendant *dispossessed* the Dean and Chapter? If the tithe was not set out as a chattel, it did not exist at all, and the defendant could not be in possession of it.] The principle of the statute is, that there must be a *perception* of the tithe by the tithe-owner within twenty years, otherwise it is a bar. [*Alderson*, B.—The effect of your argument is, that tithes as chattels may now be recovered in an action for nineteen years, although before the statute the period of limitation was six years only.]

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*Martin* was heard in reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—In this case we shall certify our opinion to the Lord Chancellor, that, in an action of debt on the stat. 2 & 3 Edw. 6, c. 13, the plaintiffs, notwithstanding the stat. 3 & 4 Will. 4, c. 27, are entitled to recover from the defendant treble the value of the prædial tithes claimed by the Dean and Chapter of Ely, in the suit instituted by them. We think this question concluded by the authority of the decision of this Court in *Grant v. Ellis*, as to rent.

(a) 3 Bing. N. C. 544.

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In that case, we construed the word "rent," in the 3 & 4 Will. 4, c. 27, s. 2, as confined to cases where an estate in the rent is claimed, and where the defendant sets up an adverse possession of the rent itself for twenty years, as an answer to the plaintiff's claim. There, as here, the word "rent" had an ambiguous meaning, being either the estate in the rent, or the rent reserved under a lease; and we held, that in this section it was confined to the former meaning alone, and that a mere non-receipt of rent, under a lease for more than twenty years, did not deprive the lessor of his right to rent under the lease. Here, by the interpretation clause, it is provided that the word *land* includes tithes. But "tithes" is, like rent, ambiguous; it may mean either the estate in the tithes, or it may mean the chattel itself, the fruits of the estate. We find it, however, included in the word "land;" and no one doubts that the word "land," in its proper sense, applies only to cases in which there are two persons, each claiming an estate in the land adverse to the other. We therefore think we ought to confine the operation of the section to cases where there are two parties, each claiming an adverse estate in the tithes. Therefore a person who has received no tithes for twenty years cannot recover the possession of them from another who has for twenty years received those tithes from the terretenant. This construction reconciles the 3 & 4 Will. 4, c. 27, s. 2, with Lord *Tenterden's* act for shortening the time of prescription in such cases, and for limiting it, in the case of tithes, to a period of sixty years, and three incumbencies; for Lord *Tenterden's* act clearly applies to the tithes as a chattel, and provides a limitation to protect the terretenant in his prescriptive mode of rendering them to the clergyman or titheholder. It is very improbable that the legislature could have intended sub silentio to have repealed so important and well-considered an act, so recently passed; but no doubt the Master of the Rolls was quite right in holding, if he thought the later act clearly incon-

sistent with the former, that it was a repeal of it, on the principle, that *leges posteriores priores contrarias abrogant*. But we think he did not give sufficient weight to this consequence, as an argument for doubting whether his construction of the 3 & 4 Will. 4, c. 27, s. 2, was correct. Our construction, which we think the more reasonable one, has the additional advantage of reconciling both acts, and of removing what would otherwise seem an apparent neglect and carelessness on the part of the legislature.

Our certificate will therefore be, for these reasons, in favour of the plaintiffs.

Certificate accordingly.

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June 5.

**EJECTMENT** for premises at Ashford, in the county of Kent. The only demise was in the names of both the lessors of the plaintiff, dated the 14th of March, 1841. At the trial, before *Coltman, J.*, at the last assizes for the county of Kent, it appeared that the plaintiffs sued as the executors of the will of William Stace, who was the surviving assignee of a mortgage term of 500 years in the premises, created in the year 1757. William Stace died in the year 1841, having by his will appointed the lessors of the plaintiff, William Harvey Stace and Thomas Davis, and his daughter Mary Stace, his executors and executrix; and probate was granted to the lessors of the plaintiff, power for the like grant being reserved to Mary Stace, the executrix.

Two of three  
co-executors  
may recover  
lands of their  
testator in  
ejectment, on a  
joint demise.

It was contended for the defendant, that the two lessors of the plaintiff, there being a third executor, could not recover the possession of the premises on a joint demise. The

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learned Judge reserved the point, and the plaintiff had a verdict.

In Easter Term, *Peacock* obtained a rule nisi to enter a nonsuit, pursuant to leave for that purpose reserved at the trial. He cited *Doe d. Poole v. Errington* (a).

*Fortescue* (with whom was *Channell*, Serjt.) now shewed cause.—The two lessors of the plaintiff have a right to recover the premises in ejectment. The estate of executors is a peculiar one; it is not analogous to that of joint-tenants, who are for most purposes seised per my et per tout, *i. e.* per my only for their own portions; but each executor has the whole estate: Com. Dig., Administration (B. 12); *Herbert v. Pigott* (b). Each, therefore, may part with the whole by his demise; and that being so, the two executors cannot, by their demise, give less than the whole. It is laid down in Bac. Abr., Executors and Administrators, (D) 1, that, “If a man appoints several executors, they are esteemed in law but as one person, representing the testator, and therefore the acts done by any one of them which relate either to the delivery, gift, sale, payment, possession, or release of the testator’s goods, are deemed the acts of all, for they have a joint and entire authority over the whole.” . . . . “And for this reason it is holden, that if one executor grants or releases his interest in the testator’s estate to the other, nothing passes thereby, because each was possessed of the whole before.” The same doctrine is laid down more fully in Godolphin’s Orphan’s Legacy, p. 134, and in Wentworth on Executors, p. 211. If this were an action by the lessors, instead of the lessee, it might equally (subject to a plea in abatement for nonjoinder of the third) be maintained. In *Dyer*, 23 a, it is stated that the question arose, “If two executors have a

(a) 1 Ad. & E. 750.

(b) 2 C. & M. 384.

term, and one grants to a stranger all that belongs to him, how much of the term shall pass? and the Court thought, that all the whole term passed, inasmuch as each of them has an entire authority and interest in the term as executor; but of other joint-tenants of a term it is otherwise; so there is a diversity."—He cited also 2 Roll. Abr. 924, (O), and *Nation v. Tozer* (a), and was then stopped by the Court, who called upon

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*Peacock*, in support of the rule.—The demise to the nominal plaintiff must be stated according to its legal effect; and on a demise by two of three executors, the estate would not pass from them *jointly*. Although the whole estate passes from *each*, John Doe cannot declare on a *joint* demise. When two executors join in a lease, each passes all that he has, therefore *each* passes the whole; consequently *the two* do not pass the whole. [*Alderson*, B.—We see that John Doe gets the entirety, which is all we want to ascertain.] But not *from the two*; each passes the whole, and no joint interest comes from the two. [*Rolfe*, B.—Suppose the two actually demised, how would you describe the demise according to its legal effect? and how would your objection be obviated if all three joined?] Because the whole three have a joint estate: *each* has the whole, and the *whole* have the whole. It is like the case of a joint and several bond; the obligee may sue all the obligors jointly, or any one of them separately, but not two out of three jointly. [*Alderson*, B.—Because they never agreed that he should do so. But here, what is true of all is true of each. It is different from the case of joint-tenants; each has the whole, and there are not many wholes, but one whole. *Pollock*, C. B.—If the three are one, why are the two more than one? The conclusion from all the cases is, that the estate of executors is different in this respect from that of

(a) 1 C., M., & R. 172.



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the management or control of the said wharf, or the mooring or stationing of ships or vessels at and alongside the same, for the purpose of using the same, in manner and form, &c. ; fourthly, a denial of the defendant's possession of the wharf; fifthly, a denial of his having placed the woodwork at or upon the bottom of the river, as in the declaration mentioned ; and lastly, a denial of notice.—On all these pleas issues were joined.

At the trial, before *Platt*, B., at the London sittings in last Easter term, it appeared that the defendant was a general wharfinger, and was the lessee of Davis's wharf, Southwark, which has a frontage of about two hundred and fifty feet. One end of the wharf, of about thirty feet frontage, was used by a Mr. Pope, a coal-merchant, who paid the defendant a yearly rent of £250, and was separated by a deal partition from the rest of the wharf. The plaintiff's vessel, the brig "*Isis*," was consigned by him from Sunderland to Pope, laden with coals ; and on her arrival in the Thames, on the 1st of April, 1845, she was placed in the berth allotted to Pope's vessels. A few days afterwards, after she had partially discharged her cargo, in moving her from the position she occupied for the purpose of enabling another vessel, which was in an inner tier, to leave the wharf, under the management of a person of the name of Sym, who was employed by the defendant to attend upon the vessels at the wharf, to point out the positions they should take, and to direct any necessary changes in their position, the wind at the time blowing strongly up the river, the vessel struck against a partition or jetty of piles, which had been constructed by the defendant to support the ground adjoining his wharf, and thereby damaged her keel. It was for this damage that the present action was brought. It appeared in evidence that Sym was not paid anything for this service by Pope, but that he received a fee of 2*s.* 6*d.* from the master of each vessel consigned to

and discharged by Pope. Pope's men did not at all interfere with the mooring of the craft under Sym's direction.

The learned Judge, in summing up, told the jury, that, upon the first issue, the question for their consideration was, whether Sym, in controlling the vessels, acted as the servant of the defendant; and that if he did, and it was within the scope of his authority to regulate the mooring and stationing of the vessels, the defendant was liable for his negligence. As to the second issue, he told them that the reward therein mentioned meant a reward to the defendant from the plaintiff; but that if the management of the whole wharf was in the defendant, and the vessel was alongside for the purpose of using it, the issue was supported thereby. On the third issue, he left it to them to say whether the defendant had the control of the wharf, and the mooring and stationing of the vessels; and upon the fourth issue, whether Pope had the exclusive enjoyment of his portion of the wharf as tenant, or the defendant retained possession of the whole. The jury found, first, that Sym acted by the authority of the defendant, and that he was negligent in striking off the moorings; secondly, that the payment of the 2s. 6d. was for the benefit of the defendant and not of Sym; thirdly, that the defendant had the control of the wharf, and the mooring and stationing of the vessels; and, fourthly, that the defendant had possession of the whole wharf: and they found, therefore, a verdict for the plaintiff on all the issues, damages 215*l.* 4*s.* 4½*d.*—On a subsequent day in Easter Term (April 30),

*Jervis* moved for a rule to shew cause why there should not be a new trial, on the ground of misdirection, or why the judgment should not be arrested; contending, that the declaration did not disclose any duty in the defendant safely to moor or station the plaintiff's vessel, arising from the use of the wharf for reward; it only stated that the

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defendant was possessed of the wharf, that the plaintiff's vessel was, by the sufferance of the defendant, *at and alongside* the wharf for reward to the defendant in that behalf, and that the defendant had the management and control of the wharf, and the mooring and stationing of vessels at and near the same, whilst they were at the wharf *for the purpose of using the same*. Secondly, he contended that the *evidence* did not shew any reward payable to the defendant for the use of the wharf by the plaintiff's vessel.

Cur. adv. vult.

The Court now delivered judgment.

POLLOCK, C. B.—This was an application by Mr. *Jervis* for a new trial, or to arrest the judgment. We are all of opinion, that, as the defendant may have his remedy by writ of error if the declaration be defective, the judgment ought not to be arrested. With respect to the other part of the rule, we are of opinion that all the questions left by the learned Judge to the jury were correctly left in point of law, and that there is no reason for questioning the judgment of the jury on the facts. That being so, the motion in arrest of judgment only remains to be disposed of; and indeed it was the only matter about which from the first the Court entertained any doubt. [His Lordship stated the declaration.] It appears to me that, after verdict, the declaration is sufficient, and that there is no ground for arresting the judgment. I think the duty of the defendant is clearly stated; that the circumstances under which it arose are stated with sufficient clearness; and that the breach is sufficiently alleged. There will therefore be no rule.

ROLFE, B.—I am of the same opinion. With respect to

the alleged misdirection, I could not understand what it was. Every question was put to the jury which arose on the pleadings and the evidence. The only question, then, is that which arises on the record. It is suggested that it does not sufficiently appear on the face of the declaration, that any duty arose by reason of the defendant's having the management and control of the mooring and stationing of the vessels at the wharf for reward. I think, however, that it is fully averred; and doubt even whether the declaration would not be good on special demurrer.

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PLATT, B.—I thought from the first that this declaration was most ingeniously drawn, to shew *two* duties, one arising from the pernancy of reward, the other from having the control of the vessels at the wharf. He who assumes such a control is bound to bring to it a reasonable degree of care. I see, therefore, no ground at all for doubting the sufficiency of the declaration.

Rule refused (*a*).

(*a*) The judgment of this Court, as to the sufficiency of the declaration, was afterwards affirmed on error by the Court of Exchequer Chamber. See post, Vol. 16.

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May 29.

FENWICK v. BOYD and Another.

A charter-party provided, that the ship should sail to any safe island or islands on the south-west coast of Africa, agreeably to instructions which were to be given to the captain in due time by the charterers or their agents, and there load, from the factors of the charterers, a full cargo of guano or other lawful produce,

which the charterers bound themselves to provide; and being so loaded should proceed therewith to a safe port in the United Kingdom, and deliver the same on being paid freight at 3*l.* 18*s.* per ton, the freight to be paid *on unloading and right delivery of the cargo*, one third in cash on arrival at port of destination, and the remainder by approved acceptances at three months, or cash equal thereto, &c. And it was further agreed, that, in case the charterers' agents should be unable to furnish a cargo of guano at the ports or places therein provided, they should have power to send the vessel to any other safe port or ports, place or places, for the purpose of obtaining a cargo of guano in the manner aforesaid, or of other goods, &c., in which case they were to pay for such service, as hire for the said vessel, after the rate of 15*s.* 6*d.* per ton per month, such pay or hire to commence from the day of the vessel's clearing outwards at the Custom-house, London, and to terminate *upon the vessel's return to her port of delivery as thereinbefore provided for, and the discharge of the cargo*. If the freighters' agents intended so to employ the vessel, they were to give the master written notice of such their intention, on production whereof the freighters engaged to pay the owner, in cash on account, three months' pay for the hire of the vessel, and the balance to be paid *on the vessel's return as aforesaid*.

The charterers instructed their agent on the south-west coast of Africa that the ship should proceed according to his instructions, and that, in case she could not find a cargo, she should proceed where he deemed it likely to procure one. The vessel sailed, pursuant to the charterers' directions, to an island on the south-west coast of Africa, where the agent met her, and informed the captain that there was no guano to be had there, and that she must procure a cargo in Saldanha Bay, (another place on the same coast), and must proceed to the Cape for a license to load a cargo there. The vessel accordingly sailed for the Cape, but, being there required to enter into an engagement to sign and hand over bills of lading for the cargo, as a security for the charges of the license, the captain refused to do so unless the agent would make the freight payable according to the time employed, instead of according to the weight of the cargo; and the latter accordingly gave the captain notice that he engaged him upon time, according to the latter clause of the charter-party:—*Held*, that, under such circumstances, this clause had come into operation, and that the time freight was recoverable.

The vessel, having loaded a cargo of guano at Saldanha Bay, proceeded therewith to England, and, under the charterers' instructions, went to Southampton to discharge her cargo. The charterers wrote to the captain there, stating that, without prejudice to the charter-party, or any dispute connected with the vessel, their wishes were that it should be landed and warehoused in the Southampton docks in bulk, which was accordingly done:—*Held*, that upon such landing of the cargo the balance of the freight became payable.

with proceed to a safe port in the Mediterranean, calling at Gibraltar for orders, &c., or to a safe port in the United Kingdom, or Baltic, calling at Cork or Falmouth for orders, &c., or so near thereunto as she might safely get, and deliver the same, on being paid freight at 3*l.* 18*s.*, British sterling, per ton of 20 cwt. of guano delivered net at the Queen's beam, &c. &c., the freight to be paid *on unloading and right delivery of the cargo*, namely, one-third in cash on arrival at port of destination, and the remainder by approved acceptances at three months, or cash equal thereto; sixty working days to be allowed for loading, commencing upon arrival of the vessel at Ichaboe, or port of loading, &c. And it was further agreed, that *in case the charterers' agents should be unable to furnish a cargo of guano at the ports or places therein provided, they should have the power to send the vessel to any other safe port or ports, place or places, for the purpose of obtaining a cargo of guano in the manner aforesaid, or of other goods, to be furnished in the usual and customary manner of the port at which the vessel might load, in which case they were to pay for such service, as hire for the said vessel, after the rate of 15*s.* 6*d.* of old register ton per month, together with all pilotages and port charges, such pay or hire to commence from the day of the vessel clearing outwards at the Custom-house, London, and to terminate upon the vessel's return to her port of delivery as thereinbefore provided for, and the discharge of the cargo.* If the freighters' agents intended so to employ the vessel, they were to give the master written notice of such their intention, on production whereof the freighters thereby engaged to pay to the said owner, in cash on account, three months' pay for the hire of the vessel, and the balance to be paid *on the vessel's return as aforesaid*; it being understood and agreed that the freighters had not the power so to employ the vessel for a longer period than fifteen months, nor less than eight months, &c. The declaration then alleged mutual promises, and averred, that the ship did with all convenient

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speed sail and proceed from London to a certain port or place on the south-west coast of Africa, to wit, Augia Pequina, agreeably to certain instructions for that purpose theretofore, to wit, on &c., given by the said charterers, and did, to wit, on the said last-mentioned day, arrive at the said last-mentioned port or place, of which the defendants, to wit, on &c., had due notice, and the said vessel remained at the said last-mentioned port or place for a certain space of time, to wit, two days: that the agent in that behalf of the said charterers, to wit, one C. J. Ashton, then being unable to furnish a cargo of guano at the said port or place, the defendants, to wit, by their said agent, instructed, ordered, and directed the master of the said vessel to sail and proceed to Cape Town, at the Cape of Good Hope, and the said vessel did then, to wit, on &c., sail and proceed to the said last-mentioned place, in pursuance of and obedience to the said instructions, order, and direction, and did afterwards, to wit, on &c., arrive at the said last-mentioned place, of which the defendants then had notice: that the said agent of the defendants was unable to furnish a cargo of guano at any of the ports or places in the charter-party provided, and thereupon afterwards, to wit, on the 24th of March, 1845, the said agent of the defendants gave notice in writing to the master of the said vessel, that, as it was not in his power to procure a cargo according to the first clause of the said charter-party, he, the said agent, did engage the said vessel upon time, according to the latter clause of the said charter-party in that behalf; and that thereupon the said vessel was employed by the defendants by time, under and by virtue of the said clause, &c., and has remained and continued in such employ from thence hitherto; and that afterwards, to wit, on &c., the said written notice, so given to the said master by the said agent of the freighters as aforesaid, was produced and shewn by the plaintiffs to the defendants, the said freighters, and they then had sight thereof. The declaration then averred, that although, by reason of the premises, the defendants became and were lia-

ble to pay to the plaintiff in cash, on account, three months' pay for the hire of the said vessel, amounting, &c., and the said sum became and was and still is due and payable by the defendants, according to the terms of the said charter-party, and although a reasonable time for the payment thereof had elapsed before the commencement of this suit, yet the defendants had not paid the same, &c.

There were also counts for the use and hire of a vessel from the plaintiff, for goods sold and delivered, money had and received, and on an account stated.

Pleas, first, to the whole declaration, non assumpsit; and to the first count, secondly, that the sailing and proceeding of the ship to the said port or place on the south-west coast of Africa, to wit, Augia Pequina, was not agreeably to the instructions for that purpose given by the said charterers, in manner and form, &c.; thirdly, that the said agent of the said charterers was not unable to furnish a cargo of guano, in manner and form, &c.; fourthly, that the agent of the defendants did not give such notice in writing to the said master of the said vessel as in the first count mentioned, nor did the said agent engage the said vessel upon time, in manner and form, &c.; and fifthly, that the said written notice so given to the said master was not produced or shewn by the plaintiff to the defendants, in manner and form, &c. Issues thereon.

The plaintiff's particulars of demand were as follows:—  
 "Under the indebitatus count of this declaration, the plaintiff will seek to recover the sum of £700, for three months' hire and use of the ship or vessel called the Ophelia and Anne, due to the plaintiff from the defendants, under and by virtue of the last clause of the charter-party mentioned and set forth in the first count of the declaration in this case." The real amount claimed, however, as appeared by a letter to the defendants from the plaintiff's brokers, before the commencement of the action, was 645*l.* 13*s.*, for "time pay, as per charter-party, on 277<sup>60</sup>/<sub>94</sub> tons <sup>1</sup>/<sub>2</sub>, from

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30th October, 1844, to 30th January, 1845, three months, at 15*s.* 6*d.* per ton per month."

At the trial, before *Pollock*, C. B., at the London sittings after last Hilary Term, the material question between the parties was, whether the freight was to be paid according to the weight of the cargo, or according to the time the ship was actually employed, under the circumstances disclosed in the evidence.

The charter-party set out in the declaration was executed on the 23rd of October, 1844. The defendants had at that time an agent, Mr. C. J. Ashton, on the south-west coast of Africa, who was superintending the loading of several vessels which the defendants had sent out for the purpose of obtaining cargoes of guano; and, on the 25th of October, they wrote to Mr. Ashton the following letter of instructions:—

"Mr. C. J. Ashton,                      "London, 25th October, 1844.

"Dear Sir,—We wish this letter to serve as an instruction to the captains of any of our ships, or those chartered by us, and that they should proceed according to your instructions, agreeably with their respective charters, and render you every assistance in their power. In case any of them cannot find a cargo, we wish them to proceed where you deem it likely to procure one.

"We are, &c.,

"JOHN BOYD & Co."

The vessel sailed from London on the 31st of October, and proceeded, according to the defendants' instructions, to the island of Augia Pequina, on the south-west coast of Africa, where she arrived on the 1st of February, 1845. Ashton, the agent, went on board, and the captain delivered him the above letter. Ashton informed the captain that there was no guano to be had there, and that the ship must procure a cargo in Saldanha Bay, and directed him to proceed to the Cape for a license, and gave him the following letter of instructions:—

" Captain M'Clelland,

" Brig Ophelia and Anne.

" February 2, 1845.

" Dear Sir,—You will please proceed immediately to Cape Town, where you will receive further instructions from our agents, Messrs. Dickson, Brownie, & Co., who will procure a license for you to load guano at Saldanha Bay, on your delivering the letter you have for them.

" I remain, &c.

" Per John Boyd & Co.

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At the same time Ashton handed to the captain a letter to Messrs. Dickson & Co., at Cape Town, requesting them to do all in their power to facilitate the loading of a cargo at the island of Malagas, in Saldanha Bay, and to give all necessary information.

The vessel accordingly sailed for the Cape, where she arrived on the 19th of February. The captain applied to Messrs. Dickson & Co., to obtain a license; but being required by them to enter into an engagement to sign and hand over bills of lading for the cargo, deliverable to their agents, as a security for the charges of the license, he refused to do so, and, on the 20th of February, wrote to the defendants, stating the circumstances in which he was placed. A few weeks afterwards Ashton arrived at the Cape, and was informed by the captain that he would not enter into the engagement required, unless Ashton would make the freight payable according to the time employed, instead of by the weight of the cargo, and that if Ashton would not do this, the ship should remain her lay days, and then go to England in ballast. Ashton remonstrated against this proceeding, stated that it was not in his power to obtain a cargo unless the captain complied with the usual customs of the place, and that the latter would be provided with a letter from him, Ashton, indemnifying him from all responsibility, and that any documents he might sign would be without prejudice to his charter-party. And on the

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22nd of March, Ashton accordingly handed to the captain the following letter of indemnity:—

“ Captain M’Clelland,                      “ Cape Town, March 22nd,  
     “ Brig Ophelia and Anne.                      1845.

“ Sir,—In order to enable me to procure a cargo for your vessel, it is necessary that you should sign bills of lading in favour of any parties to shipping, and at any rate of freight mentioned therein.

“ By agreeing to the above, I consider that you are acting for the benefit of your charterers, Messrs. John Boyd & Co. of London, and I hereby agree to hold you harmless from all responsibility, and that this shall in no way be considered to interfere with your original charter-party.

“ I remain, Sir,

“ Yours, &c.

“ C. J. ASHTON,

“ On behalf of Messrs. John Boyd & Co.”

The captain, however, refused to alter his previous determination, and thereupon Ashton gave him the following letter:—

“ Cape Town, 24th March, 1845.

“ Sir,—As it is not in my power to procure for you a cargo according to the first clause of your charter-party, I now engage you upon time, according to the latter clause of the same.

“ I remain, &c.

“ C. J. ASHTON,

“ Per J. Boyd & Co.”

The requisite license was then procured, the charges of which amounted to 353*l.* 15*s.*, for which sum a bill of exchange was drawn by Ashton upon the defendants, payable thirty days after sight, to the order of Mr. Field, the collector of customs at Cape Town, which was transmitted to the defendants, and accepted and duly paid by them; and, under an indemnity from Ashton, bills of lading were signed by the captain, whereby the cargo was made

deliverable to Mr. Field or his assigns, but subject, after payment of his demand, to freight as per charter-party. The captain, on the 29th of March, made a formal protest, before a notary public, that he consented to the arrangement only upon the footing, that his doing so should not be held to interfere with or affect in any way the original charter-party.

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The vessel proceeded to Saldanha Bay (which is on the south-west coast of Africa, about seventy miles from the Cape), and there, under Ashton's superintendence, loaded a full cargo of guano, with which she arrived off Falmouth on the 26th September, 1845; from thence, under the instructions of the defendants, she proceeded to Southampton for the purpose of discharging her cargo. On the 1st of October, the defendants wrote to the captain, stating that, without prejudice to the charter-party, or reference to any dispute connected with the vessel, their wishes regarding the cargo were, that it should be warehoused in the Southampton docks in bulk. The cargo was accordingly landed in the Southampton docks, where it remained up to the time of the trial of this cause.

Another action, which stood for trial next in the paper after the present, was an action of indebitatus assumpsit, brought by the plaintiff against the defendants for the sum of 2535*l.* 10*s.*, being the balance of time-freight for the period during which the ship was employed after the expiration of the three months; and in that action the further question arose, whether there had been such a "return of the vessel to her port of delivery and discharge of her cargo," within the meaning of the charter-party, as to entitle the plaintiffs to recover. And it was agreed between the parties that both the cases should be stated to the jury and determined by them together.

Upon these facts, the Lord Chief Baron was of opinion, that, under the circumstances, the captain was warranted in

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his refusal to enter into the engagement required of him at the Cape, and that the defendants were liable upon the agreement for time-freight then entered into. Upon the other question, his Lordship thought that there had been such a delivery of the cargo as to make the balance of the freight payable; and under his direction the plaintiff had a verdict in each of the actions for the amount claimed, leave being reserved to the defendants to move to enter a non-suit.

In last Easter Term, *Jervis* obtained rules nisi accordingly, against which, in the present Term, (May 28),

*Watson* (*Lush* with him) shewed cause.—The verdict in both these cases is fully warranted by the evidence. The true construction of the charter-party is, that, in case a cargo cannot be provided by the charterers' agent, at any place designated by him for that purpose under the stipulations of the charter-party, and the letter of instructions given to him by his employers, the second branch of the charter-party shall forthwith come into operation, which empowers the charterers or their agent to hire the vessel on time-freight, and send her to any other safe ports or places for a cargo. Here it appears that at Augia Pequina, the place designated under the charter-party, a cargo could not be obtained, and therefore the other clause of the charter-party at once attached.

As to the other point, the charter-party freight is by the charter-party to be paid "on unloading and right delivery of the cargo, namely, one-third in cash on arrival at port of destination, and the remainder by acceptance at three months." Then, by the subsequent clause, the hire upon time-freight is to terminate "upon the vessel's return to her port of delivery as thereinbefore provided for, and the discharge of the cargo;" and the balance of such freight is to be paid "on the vessel's return *as aforesaid*." The defendants contend that these words, "*as aforesaid*," import "to be paid *in manner aforesaid*,"—that is, by acceptance at

three months. [*Rolfe*, B.—Or, at all events, that payment is not to be made until the return of the vessel to her port of destination, and the discharge, i. e. the unloading and *right delivery*, of her cargo.] It is submitted that these words mean merely the *return* as aforesaid, i. e. her return to her port of delivery as provided for by the previous part of the charter-party. But further, although the plaintiff has still, by the terms of the charter-party, and under the Customs Regulation Act, 3 & 4 Will. 4, c. 57, s. 47, a lien on the cargo, it has been discharged, and that by the orders of the defendants, and the freight has been fully earned. It has been discharged to the order of their own agent, who has warehoused it. The existence of a lien on goods does not prevent a vendor from suing for the price of them. [*Rolfe*, B.—The defendants must say that the freight is still being earned. *Alderson*, B.—As soon as the cargo is taken out of the ship, and she is useful for any other purpose of navigation, the freight ceases.]

*Jervis* and *Unthank*, contra.—In the first of these cases, two questions arise; the first, on the construction of the charter-party; the other, on that of the letter of instructions from the defendants to their agent, Ashton. Now the first clause of the charter-party must be read with reference to the latter alternative, that in case the charterers' agents should be unable to furnish the cargo at the ports or places before provided, they should have the power to send the vessel to *any other* safe ports or places for the purpose of obtaining a cargo of guano, or of other goods. It clearly amounts altogether to a seeking voyage. [*Alderson*, B.—No doubt; but then it says you are to seek it on the terms of paying time-freight.] The "other safe ports and places" must mean other than those specified in the former part of the instrument, which includes all ports and places on the south-west of Africa. The stipulation as to time-freight, therefore, applied only to places elsewhere than on the

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south-west coast of Africa. Saldanha Bay was a place within the first clause of the charter-party, to which the alternative of time-freight did not apply. Then as to the letter, it is only a *conditional* designation of Saldanha Bay, unless in the meantime the vessel meets with the agent, in which case the charter-party has itself provided what is to be done. It is not a positive designation of the island, but subject to instructions from the agent. It was at that time uncertain where guano would be found; the place is, therefore, left to be fixed by the agent on the spot; a limit being at the same time placed to the time and expense of the owner, by restricting it to a certain range, namely, to an island or islands on the south-west coast of Africa. It is said the plaintiff may recover on the money counts; but that is not so; for the particulars tie him up to the charter-party freight; and the vessel had not arrived at her port of discharge when this action was brought, therefore the contract was not fully performed.

With respect to the other action, the hire for time-freight was not to terminate until the return of the vessel to her port of delivery, *as thereinbefore provided for*, and the discharge of the cargo, and the balance of freight is to be paid "on the vessel's return *as aforesaid*." Now, by the former part of the charter-party, the freight is payable "on unloading and *right delivery* of the cargo." The *discharge* and *right delivery* of the cargo are used as synonymous terms. What was done at Southampton was without prejudice, and it is the same for this purpose as if the cargo had remained on board. And as the payment is to be in cash on delivery, there is no reason why the owner should retain a lien on the cargo. Besides, the Customs Regulation Act, 3 & 4 Will. 4, c. 47, s. 47, preserves the lien for freight, when the goods are landed in docks, as if they remained on board. But, inasmuch as there has not been any "right delivery" of the cargo, the title to freight has not attached.

Cur. adv. vult.

The Court now delivered their judgment.

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POLLOCK, C. B.—The principal question in these cases is, whether, by reason of the vessel ultimately going to Saldanha Bay, which it is said is an island within the charter-party, time-freight was recoverable. The question turns upon this, whether that island was one of the “ports or places herein provided,” to which the vessel was in the first instance to proceed. I think the charter-party is to be construed with reference to the instructions given to the captain; and no instructions were given to go to Saldanha Bay until after the question of cargo freight was entirely at an end, and the defendants’ agent had distinctly stated that he was unable to procure a cargo. It is not the case of a distinct new hiring upon a time contract; but the agent dealt with the transaction thus:—“Where you have been instructed to go under the first clause of the charter-party, I am unable to procure you a cargo; I therefore hire you on time, according to the latter clause of the charter-party.” There is abundant evidence to shew that the parties considered this island not to be within the instructions, and as not being one of the ports or places thereinbefore provided for.

ALDERSON, B.—The question is, whether the plaintiff is entitled to recover for time-freight, and it appears to me that he clearly is. The vessel is in the first instance to proceed to any safe island or islands on the south-west coast of Africa, *agreeably to instructions* to be given to the captain by the charterers or their agents, and there load a cargo. Then it is stipulated, that in case the agents should be unable to furnish a cargo at the ports or places *therein provided*, they should have the power to send the vessel to any other safe ports or places for the purpose of obtaining a cargo, in which case the charterers were to pay time-freight. The question therefore is, what are the ports and places therein provided? Undoubtedly, such island or islands on



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the south-west coast of Africa as should be designated in the instructions given by the charterers or their agents to the captain. Then, as a cargo could not be procured at the place so designated, the other clause of the charter-party came into operation, which provided for the engagement of the vessel on time-freight.

With respect to the other point, which arises only in the second action, I think the true construction of the charter-party is, that as soon as the vessel returns to her port of destination, that is, "to a safe port in the United Kingdom," the time-freight is payable.

ROLFE, B.—I am of the same opinion. The parties are unable to comply with the first term of the charter-party, by which a cargo is to be procured at the ports or places designated in the instructions of the charterers, and then adopt the latter alternative. There was a distinct contract under the second branch of the charter-party, which entitles the plaintiff to recover in the first action. On the other point I quite agree with my brother *Alderson*. The "vessel's return to her port of delivery, and the discharge of her cargo," means, when she is so discharged as that the owner might have her at his disposal: it is immaterial that he retained a lien upon the cargo.

PLATT, B.—The parties intended a designated voyage, the designation to be completed by instructions from the charterers or their agent. The moment the charterers, or their agent, gave the instructions, and made the election of the island therein mentioned, the voyage was perfectly designated. The latter branch of the charter-party looks to a voyage ascertained in the first place by the charterers, or their agent abroad, and when that is found to be unprofitable by the inability to obtain a cargo there, then he is to be at liberty to hire the vessel abroad, but it is to be on time-freight. As to the other point, the only return men-

tioned in the charter-party, to which the words "the vessel's return as aforesaid" can apply, is her return to her port of delivery and discharge of her cargo; and that is the period up to which the time-freight is payable.

Rule discharged.

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## VACATION SITTINGS AFTER TRINITY TERM.

TARRY v. NEWMAN.

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**TRESPASS** for assault and false imprisonment. Plea, Not guilty (by statute). At the trial, before *Maule, J.*, at the last Lent Assizes for Bucks, it appeared that the defendant, a magistrate of that county, had convicted the plaintiff under 7 & 8 Geo. 4, c. 29, s. 39, for stealing a growing ash-tree, the property of E. F. Maitland, and had imprisoned him in the Aylesbury house of correction on that conviction. The information and complaint on which the conviction proceeded had been given by one Reeves to Mr. Dashwood, a magistrate, who had thereupon summoned the plaintiff to appear before him to answer it. At the time and place fixed, the defendant heard the evidence, and adjudicated, Mr. Dashwood and another magistrate being

An information, under 7 & 8 Geo. 4, c. 29, s. 39, for stealing a growing ash-tree, the property of M., was preferred by R. to D., a justice of the peace, who summoned the offender. At the time and place fixed in the summons, he appeared, and was convicted by another magistrate, the defendant, D., the summoning magistrate,

being present, but not taking any part. The conviction ordered the plaintiff "to forfeit and pay, over and above the value of the tree stolen, the sum of 5*s.*, and for the value of the tree stolen 1*s.*, and also to pay the sum of 1*l.* 4*s.* 6*d.* for costs, to be paid on or before the 19th of March next, and in default of payment of the said sums to be imprisoned in the house of correction" at &c., "and there kept to hard labour for one month, unless the said sums shall be sooner paid." It then ordered the 5*s.* to be paid to the overseer, the 1*s.* to M. the party grieved, and the 1*l.* 4*s.* 6*d.* to be immediately paid to R., the complainant.

An action of trespass and false imprisonment having been brought against the defendant,—*Held*, that the conviction was good, notwithstanding it had not proceeded on the information of the party aggrieved, or been made by the magistrate who received the original information and issued the summons on which the defendant appeared; nor was it invalidated by its mode of adjudicating the costs.

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present, but not acting in the case. The operative part of the conviction was as follows:—

“For that he the said William Tarry, on the 9th day of February, in the year aforesaid, at the parish of Hughendon, in the said county of Bucks, one ash-tree of the value of 1s. at the least, the property of Ebenezer Fuller Maitland, Esq., then and there growing, unlawfully did steal, take, and carry away, against the form of the statute in such case made and provided: I, the said John Newman, do therefore adjudge the said William Tarry, for the said offence (the same being his first offence), to forfeit and pay, over and above the value of the said tree so stolen as aforesaid, the sum of 5s., and for the value of the said tree so stolen as aforesaid, the further sum of 1s., and also to pay the sum of 1l. 4s. 6d. for costs, to be paid on or before the 19th day of March next, and in default of payment of the said *sums*, to be imprisoned in the house of correction at Aylesbury, in and for the said county of Bucks, and there kept to hard labour for the space of one calendar month, unless the said *sums* shall be sooner paid; and I direct that the said sum of 5s. shall be paid to one of the overseers of the poor of the same parish in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided, and that the said sum of 1s. shall be paid at the same time to the said E. F. M., the party aggrieved by the said offence, who has not been examined in proof of the same (*a*); and I do order that the said sum of 1l. 4s. 6d. for costs shall be immediately (*b*) paid to Joseph Reeves, the complainant. Given under my hand and seal the day and year first above mentioned.

“JOHN NEWMAN, (L. S.)”

(*a*) See Dickenson's Sessions, 6th edit. 886; Paley on Convictions, 3rd edit. 46, 142.

form of conviction given by 7 & 8 Geo. 4, c. 29, s. 71, or in the act. See judgment of *Parke*, B.

(*b*) This word is not in the

The warrant of commitment recited, that the plaintiff had been convicted on the oaths of J. Reeves and others, of stealing an ash-tree, &c., and then proceeded thus: "And thereupon I, the said justice, adjudged the said William Tarry to forfeit and pay for his said offence, the same being his first offence, the sum of 5*s.* over and above the value of the article so stolen as aforesaid, and for the value of the said article so stolen as aforesaid, the further sum of 1*s.*, and also to pay the sum of 1*l.* 4*s.* 6*d.* for costs; and I directed that the said sum of 5*s.* should be paid to one of the overseers of the poor of the parish last aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided, and the said sum of 1*s.* to the said E. F. Maitland, the party aggrieved by the said offence, who has not been examined by and before me in proof of the same; and that the sum of 1*l.* 4*s.* 6*d.* for costs should be paid to the said J. Reeves the complainant. And whereas the said Wm. Tarry has made default in payment of the said sums," &c. (the warrant then directed the constable to take the plaintiff to the house of correction, and the keeper of it to receive him and keep him to hard labour for one calendar month, "unless such sums as aforesaid should be sooner paid or satisfied.")

The plaintiff's counsel objected to the conviction, on three principal (among other) grounds: first, because it had not proceeded on the information and complaint of Mr. Maitland, the party aggrieved; secondly, because the original information had been laid, not before the defendant, but before another magistrate; thirdly, because the defendant had awarded the sum for costs improperly, viz. by ordering the imprisonment of the plaintiff on default of payment by him as well of that as of the two other sums. *Maule, J.*, reserved these points. The defendant consented to the information and warrant being put in, as well as the convic-

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tion and warrant of commitment. The plaintiff had a verdict for £5 by consent, leave being given to move to enter a verdict for the defendant. A rule having been obtained accordingly,

*O'Malley* now shewed cause.—First, the conviction was bad, because the party aggrieved should have been the complainant. This appears from sect. 68 of 7 & 8 Geo. 4, c. 29, by which the justice may discharge the party from his conviction on his making “such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice.” Now, if the party aggrieved, though known, is not present, or out of the realm, or at a distance within it, the party convicted could not seek him out to pay him. By sect. 70, “If a party proceeded against pays the sum adjudged, or is discharged from his conviction under sect. 68, he shall be released from all further proceedings for the same cause.” By sect. 66, if the party aggrieved is unknown, the sum awarded as the value of the property taken is to be applied as a penalty, i. e. paid to the overseers of the poor. [*Alderson*, B.—How, in that case, could the party aggrieved be unknown, and yet be the complainant?] If a stranger may inform, a friend of the offender may do so behind the back of the party grieved, and by consenting to the offender’s making satisfaction under sect. 68, might, under sect. 70, bar the party grieved of his remedy by action. (He cited 1 & 2 Will. 4, c. 32, s. 6). By 5 Geo. 3, c. 14, s. 3, the penalty for fishing in a water protected by that act, is given to the “owner of the fishery,” being to be paid to the convicting justice for his use, so that there would be no need to seek the party grieved in order to pay him. Yet, in a case on that act, where the information was set out in the conviction, it was held that the conviction must expressly state, as well in the information as in the evidence also set forth, that the proceedings were

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carried on at the instance (a) of the owner of the fishery, being the party injured (b). [*Parke, B.*—This conviction shews who the party grieved is, and awards him 1s. Sect. 66 shews that the party grieved is not in all cases the complainant; nor is there anything absurd in the enactment of sect. 70, that, where a proceeding against a party has had a certain penal result, no one else shall have a civil remedy for the same matter.] Though *Midelton v. Gale* (c) seems to the contrary, the stat. 1 & 2 Will. 4, c. 32, there acted on, shews, by sects. 30, 37, 46, that it was there contemplated there might be proceedings before magistrates which the party grieved might not appear in or direct. Sect. 41 only applies where the party aggrieved is unknown. It did not appear whether Maitland authorised Reeves to complain. [*Parke, B.*—The parol evidence, if gone into, might have shewn that the party grieved was the party complaining. Must that fact appear on the face of the conviction? The form of conviction given in the act distinguishes between the complainant and the party grieved, evidently contemplating that they may be different persons, and this conviction follows the words of the act. *Alderson, B.*—Nothing shews whether Maitland, the party grieved, was known.] The stat. 3 Geo. 4, c. 23, s. 2, only applies where two magistrates must adjudicate. In *Regina v. Wilcock* (d), Lord Denman said, the third objection, arising from the information having been before different justices from those who convicted, was certainly not removed by 3 Geo. 4, c. 23, s. 2, because the fact of such difference is not recited in the conviction, as required by that enactment.—He also cited *Rex v. Corden* (e).

(a) Distinguished from "on behalf," 1 Chitt. R. 154.

(b) 2 B. & Ald. 378; *S. C.*, and fully reported by Mr. Chitty, counsel in the cause, in 1 Chitt. R. 347.

(c) 8 Ad. & E. 155; 3 N. & P. 372.

(d) 14 Law J., (N. S.), M. C. 104; 1 New Sess. Cas. 651, 663.

(e) 4 Burr. 2279.

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Secondly, as the information was taken and the summons issued by another justice, the jurisdiction to convict attached to him only, being the first duly qualified magistrate who had possession and cognizance of the facts. This principle was recognised in *Jones v. Gurdon* (a), by *Patteson, J.*, at *Nisi Prius*, though the decision in banc turned on particular words of 52 Geo. 3, c. 93, Schd. (L). *Wightman, J.*, also stated it to be the general rule, in *Reg. v. Ellis* (b). The plaintiff's appearance before the defendant does not cure this error, for the summoning justice was also present.

Thirdly, the conviction is bad for ordering the imprisonment of the plaintiff, under stat. 7 & 8 Geo. 4, c. 29, on default of payment of the costs, as well as of the two other sums: for as sect. 39 provides nothing as to costs, the matter respecting costs, contained in the form of conviction given by sect. 71, can only apply to sect. 43 and to sect. 67, which expressly mention costs, and the proper remedy was by separate proceeding under 18 Geo. 3, c. 19. [*Alderson, B.*—It is consistent with this conviction, that after it and before commitment the plaintiff may have paid the 5s. and the 1s., and not the costs. *Parke, B.*—The commitment is good, and may help the conviction; both should here be read with the information. The words in the conviction ordering the payment of the costs may be taken parenthetically, so that "said sums" would apply to the penalty and value of the articles only.]—*Ward v. Rolfe* (c), and *Regina v. Wroth* (d), were also cited.

*Worlledge, (Byles, Serjt., with him)*, in support of the rule.—The defendant had jurisdiction to convict, though the party grieved did not inform and complain, for there is no express direction that he should do so, and the inferences

(a) 2 Q. B. 600, 603. See 25, Bail Court, Mich. 1842: *Reg. v. Sainsbury*, 4 T. R. 451.  
 Paley on Convictions, 3rd edit. 27.  
 (b) 12 Law J., (N. S.), M. C.  
 (c) 9 Justice of the Peace, 335.  
 (d) 1 New Sess. Cas. 404.

from the act are the other way. Sect. 65 of 7 & 8 Geo. 4, c. 29, provides, that a party may be charged on the oath of "a credible witness," without fixing who the witness shall be. By sect. 63, the owner, or his servant or agent, or a peace-officer, may, on view of the offence, take the party before a justice. Now the plaintiff's argument would prove, that unless one or other of these persons saw the offence committed, the offender must escape. The ruling in *Rex v. Daman* (a), that the party grieved and the complainant ought to be shewn by the information and conviction to be the same person, proceeded on the express enactment in 5 Geo. 3, c. 14, ss. 3 and 4, that the owner of the fishery, viz. the party grieved, shall have the penalty for illegal fishing, and might recover it by action. *Griffiths v. Harries* (b) applies. Next, it is said that, if any one but the party grieved might inform, a stranger might do so, and bar the owner of his civil remedy without his consent; but section 70 of this act does not shew what the "further, or other proceedings for the same cause" which are to be barred, are. *Midleton v. Gale* is rather in favour of the defendant, for, on the Game Act, 1 & 2 Will. 4, c. 32, the owner need not institute the proceedings.

Secondly, at common law, one justice might deal with a complaint which another had received. In *Jones v. Gurdon*, Lord Denman said: "It may be conceded, that, in general, where no provision is made to the contrary, the original information or complaint may be made to one justice, and another may hear and determine the matter." Here the summoning justice was in fact present at the conviction, but the conviction was by the defendant singly, as authorised by section 65. [*Parke, B.*—As the summoning justice did not share in the adjudication, his presence did no more than exclude any inference of his having contested

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(a) 2 B. & Ald. 378; 1 Chit. R. 347.

(b) 2 M. & W. 335.



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the defendant's jurisdiction.] The defendant might have objected to the information and summons being made part of the evidence. In *Regina v. Wilcock* (a), the information was put in, as it might be on the trial of an appeal against a conviction, so that it clearly appeared that one set of justices had entertained the complaint, and another adjudicated on it. Thirdly, the order to pay costs does not affect the conviction. [He was stopped on this point.]

POLLOCK, C. B.—The rule to enter a verdict for the defendant must be absolute. The questions turn on the construction of section 39 of 7 & 8 Geo. 4, c. 29, which creates the particular offence, and is illustrated by several other sections of that act. The first point made for the plaintiff was, that the party grieved must be the party making the complaint. Had that been intended by the legislature, it would have been easily expressed, but is not so enacted. However, we are called on to declare it to be the necessary conclusion, to be drawn from legal reasoning. But it would be hard on a magistrate to decide from deductions purely argumentative that an action of trespass lies against him, unless something more definite should appear on examining the particular statute. The inference apparent from sect. 39 is, that any person whatever might institute this proceeding before a magistrate; but sect. 65 makes that very clear, for it says nothing about the complaint being only by the party grieved, and shews that no one need be before the magistrate except the “credible witness,” who may be the peace-officer, or other person not being the party grieved. It was next argued that, by sect. 70, this conviction indemnifies the offender against other proceedings, so that unless the party grieved were necessarily the complainant, a friend of the offender might proceed against him, and thus, by col-

(a) 1 New Sess. Cas. 651.

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lusion, deprive the party grieved of his civil remedy; but any such fraud would annul such discharge from the conviction, and the whole proceedings: *Duchess of Kingston's case* (a). Again, the legislature may have thought it right that a party proceeded against before a magistrate under this act should be cleared from any other proceeding. It was next asked, whether the conviction by a justice who had not summoned the plaintiff was valid, so as to justify a commitment under it. The short answer is, that, by the express words of sect. 73, "no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and that there be a good and valid conviction to sustain the same;" and it is a rule, that, in an action of trespass against a magistrate by a convicted party, he cannot travel out of the conviction, or adduce evidence to contradict it, if it is good on the face of it, though on appeal to the sessions he might have impugned the conclusion of the magistrates in that manner (b). I give no opinion whether one magistrate may proceed on an information which another has received, for if this conviction is good on the face of it, we cannot suffer it to be falsified by extrinsic matter. The defendant might have raised the question by not appearing, or might have appealed (c). On the last point, as to the award of costs, it is clear that, taking the whole act together, it was intended that costs as well as damages might be awarded by the convicting magistrate, and I think that in this case the form in which this has been done is correct according to the act.

PARKE, B.—The only question on which I have entertained any doubt is the first, namely, whether the information can be exhibited by any person but the party grieved.

(a) 1 East, P. C., 468; 1 Leach, Cr. C., 146. East, 22: and see *Mann v. Davers*, 3 B. & Ald. 103.

(b) Paley on Convictions, 3rd edit., 316; *Gray v. Cookson*, 16 (c) The conviction being by one justice only. See sect. 72.

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My doubt arose on sections 68 and 70, and is not entirely removed, but is not sufficiently strong to induce me to differ from the rest of the Court. Section 39, in defining and authorising this proceeding, does not enact that no one but the party grieved shall proceed for penalties. But it was argued for the plaintiff, that it would be hard on the party grieved if his action for the damage could be defeated by a conviction had behind his back, by a person proceeding without authority from him (*a*), and by collusion with the guilty party; and *Rex v. Daman* (*b*) was cited; but the desired inference, that the complainant only can be the party grieved, arose far more strongly from the context of the act there proceeded on, than from this. For, as has been pointed out in argument, by that act (5 Geo. 3, c. 14, s. 4), a remedy by action for the penalty was expressly given to the party grieved, and by sect. 3, the penalty was directed to be paid to the convicting justice for his use. As we are, therefore, at liberty to put a different construction of this act, I am of opinion, on the whole, that the bar in sect. 70 only applies in cases where the party grieved, after himself making or authorising complaint to be made before a magistrate, which has had any of the results mentioned in that section, has afterwards brought an action for an injury already compensated in the other manner. Besides, the words of the act are very general and strong to shew that any person whatever may exhibit the information in this case.

The next question is, whether the same magistrate who received the information, and issued the summons, must proceed to convict. Upon this subject no common-law rule can exist, as the penalties can only be awarded by authority of a statute; so that the question in every such case is, what

(*a*) Reeves was, in fact, the servant of Maitland, the party grieved; but the cause was disposed of on admissions at Nisi Prius, and this was not thought material.  
 (*b*) 3 B. & Ald. 378; 1 Chitt. R. 347.

did the legislature intend in each instance? Now in this case no reasonable doubt can exist, under sect. 65, as to the power of one magistrate to proceed and hear the complaint, for he may "summon the person charged to *appear* at a time and place to be named in such summons," not to appear "before him," namely, the summoning magistrate. That distinguishes this case from *Jones v. Gurdon* (a).

The section provides, that if the party summoned "shall not appear," that is, shall not appear before *any* justice at the time and place named in the first summons, then, on proof had of the service of that summons, the summoning magistrate may proceed alone, *ex parte*, to adjudicate, or issue his warrant to apprehend such person, in which case the "justice before whom the person charged shall appear or be brought, shall proceed to hear and determine the case:" whereas, if the party appears, i. e. before *any* justice, on return of the first summons, the magistrate on the spot may entertain the original application, and adjudicate thereon. The conviction, therefore, appears to me to be, so far, valid.

As to the order for payment of costs, the act is very perplexed; but this conviction has stated all that is required by it, and follows the form prescribed by sect. 71, except in ordering payment of the costs to be made "immediately," for which there is no authority. The intention of the act was clear, that, if the party convicted went to prison, he should pay the costs. But it is said that as, when imprisoned, he could not get out thence without paying the costs as well as the penalty, and the value (b), an illegal condition was thus laid upon him; but, on comparing the act of Parliament with the conviction, I think no condition has been imposed on him which is not justified by the act. The conviction states, that the plaintiff "shall forfeit and pay, over and above the value of the tree so stolen as aforesaid, the sum of 5*s.*; and for the value of the said tree so

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(a) 2 Q. B. 600.

(b) See sect. 67.

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stolen as aforesaid, the further sum of 1*s.*; and also the sum of 1*l.* 4*s.* 6*d.* for costs, to be paid on or before the 19th day of March next, and in default of payment of the said sums, to be imprisoned," &c. It then orders that "the said sum of 1*l.* 4*s.* 6*d.* for costs shall be immediately paid to Joseph Reeves." Thus the context of the conviction shews that the costs awarded are to be paid down to Reeves, while time is to be given for discharging the damages and value; and, looking to the substance, it is clear that no imprisonment is to take place if those two sums are paid; but if the party is so imprisoned, then he cannot be discharged without paying the third sum also, viz. the costs.

It was lastly urged that the commitment was bad; but *Daniel v. Phillips* (a) is in point to shew that it must be read with the conviction, and construed in the same way. Then no illegal condition was imposed on the plaintiff by either.

ALDERSON, B.—I entirely agree. The only point about which doubt has been entertained is, whether the party complaining must not, ex necessitate, be the party grieved; but I observe the form of conviction in sect. 71 directs that the value of the articles stolen, or the amount of the injury done, "shall be paid to C. D. [*the party aggrieved, &c.*]" "and I order that the said sum of                      for costs shall be paid to                      , [*the complainant.*]" That shews that the complainant and party grieved may be different persons, and serves to answer that doubt.

PLATT, B., concurred.

Rule absolute (b).

(a) 1 C., M., & R. 662; 5 Tyr. 292; *Rex v. Mellor*, 2 Dowl. P. C. 173.

(b) 18 Geo. 3, c. 19, gives au-

thority to justices of peace *out of sessions* to award costs to be paid to the party injured.

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PILKINGTON and Another v. SCOTT and Others.

June 24.

**T**HIS was an action on the case against the defendants, for wrongfully harbouring one Joseph Leigh, a servant of the plaintiffs. Plea, not guilty (with other pleas not material to be stated).

At the trial, before *Patteson*, J., at the last Liverpool Assizes, the plaintiffs put in evidence an agreement made between them and Joseph Leigh, dated in the year 1844. The substance of this agreement was, that the said Joseph Leigh should and would, at all times, during the term of seven years, to be computed from the day of the date, serve the plaintiffs, their executors, &c., as a crown-glass maker; that he should not, during the said term, work for any other person at any other glass-house or place of business, without the licence of the plaintiffs; that it should be lawful for the plaintiffs to deduct from his wages any fine that he might incur for breach of their rules; that, during any depression of trade, he should be paid a moiety of his wages; that, if he should be sick or lame, the plaintiffs should be at liberty to employ any other person in his stead without paying him any wages; that the plaintiffs should pay him when and so long as he should continue to be employed, and work as a crown-glass maker, wages by the piece (stating them), and £8 per annum in lieu of house-rent and firing; and that the plaintiffs should have the option of dismissing him from their service on giving him a month's wages or a month's notice.

It was contended for the defendants, that the agreement was invalid, first, as being unilateral, and not mutual; for that under it the plaintiffs, the masters, were not bound to

The plaintiffs agreed in writing with L., that he should serve them for seven years as a crown-glass maker; that he should not during that term work for any other person without their license; that they might deduct from his wages any fine he might incur for breach of their rules; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick or lame, the plaintiffs should be at liberty to employ any other person in his stead, without paying him any wages; that the plaintiffs should pay him, so long as he should be employed and work as a crown-glass maker, certain wages by the piece, and £8 a year, in lieu of house-rent and firing; and that the plaintiffs should have the option

of dismissing him from their service on giving him a month's notice or a month's wages:—*Held*, that this agreement bound the plaintiffs to employ L. during the seven years, subject to the above power of dismissal; that there was, therefore, a good consideration for L.'s contract to serve for the seven years, and the agreement was not in unlawful restraint of trade.

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employ the workman at all, but only to pay him wages so long as he should in fact be employed; and secondly, because it was in restraint of trade. The learned Judge overruled the objections, and left the case to the jury, who found a verdict for the plaintiffs, damages £4.

In Easter Term, *J. Henderson* obtained a rule nisi for a new trial, on the ground of misdirection on the above points.

*Martin and Crompton* now shewed cause.—There is no ground for the objections taken to this agreement. The provision for a month's notice before dismissing the workman implies that the plaintiffs were under an obligation to employ him during the term, subject to that provision. They are bound to keep him in their employ during the seven years, unless they give him a certain notice; if they turn him away without that notice, he has a right of action; and even if they omitted to employ him at all, he would have a right to recover some damages. The agreement, therefore, is mutual. Neither is it unlawful as being in restraint of trade. Why may not a man hire himself for seven years as well as for one year? Since the case of *Hitchcock v. Coker* (a), the Court will not inquire into the adequacy of the consideration; it is enough if there is a sufficient consideration to support an assumpsit. Here the right to have a month's notice of dismissal is of itself a sufficient consideration.

*J. Henderson*, contrà.—This agreement is invalid. It purports to be a contract on the part of Leigh to work for seven years for no other person than the plaintiffs, without any contract on their parts to employ him at all. It may be admitted, that if any consideration, not being a colourable one, appears, the Court will not now inquire into the

(a) 6 Ad. & Ell. 440.

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value or amount of it; that is, they will not make a bargain for the parties. But it is established law, that a contract in restraint of trade, which is universal in point either of space or of time, is altogether void: *Young v. Timmins* (a), *Ward v. Byrne* (b), *Mallan v. May* (c). [*Alderson*, B.—If it be in partial restraint of trade only, it is good, if founded on a consideration. This contract is for seven years only; it is therefore partial only; consequently it is a lawful contract, if there be a good consideration.] If it withdraws the workman from labouring for the community generally, without any obligation on the masters to employ him, it is invalid. Now throughout this agreement there is no contract or stipulation on the part of the masters to employ the party at all. They only contract to pay him wages “when and so long as he shall continue to be employed.” That is no contract to employ him: *Aspden v. Austin* (d), *Dunn v. Sayles* (e). Then, if so, supposing, immediately after the signing of the contract, the plaintiffs refuse to give him employment, he nevertheless cannot for seven years work for any other person. That is an undue restraint of trade. The agreement to work for no other person is absolute and independent, whereas the agreement to pay wages is dependent and conditional on the employment. Nor can the Court, from the provision as to a month’s notice, imply a covenant to employ him during the seven years. [*Alderson*, B.—Is it not a necessary inference therefrom, and also from the power to employ other persons in his stead during his sickness, that they are bound to take him into their employ? It is because they have engaged to employ him for seven years, that they take a power to discharge him on giving a month’s notice. Surely, if I take a power to put an end to an agreement, it is because the agreement has begun. The power to dismiss implies that they have engaged to employ. *Platt*, B.—The proviso must be taken

(a) 1 C. &amp; J. 331.

(b) 5 M. &amp; W. 548.

(c) 11 M. &amp; W. 653.

(d) 5 Q. B. 671.

(e) Id. 685.



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to be an exception out of the preceding contract.] Probably the masters did intend to bind themselves for the seven years, but it is not so expressed.

ALDERSON, B. — The question in this case simply is, whether the rule ought to be made absolute, on the ground that this is a contract in restraint of trade, and has no adequate consideration to support it. If it be an unreasonable restraint of trade, it is void altogether; but if not, it is lawful, the only question being whether there is a consideration to support it; and the *adequacy* of the consideration the Court will not inquire into, but will leave the parties to make the bargain for themselves. Before the case of *Hitchcock v. Coker*, a notion prevailed that the consideration must be adequate to the restraint; that was, in truth, the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain. Here the restraint is for seven years only, with an engagement on the part of the workman not to go into the service of any other person during that time; and the question is, whether there is a consideration for that engagement. Mr. *Henderson* says there is not, because there is no undertaking on the part of the plaintiffs to employ the workman. But, looking at the agreement altogether, I see sufficient to satisfy me that they are bound to employ him. The workman agrees to serve them during the seven years on certain terms, and they agree to pay him certain wages, and a moiety thereof during any depression of trade, with liberty to them to employ any other person in the event of his being sick or lame. Then they are to have the option of dismissing him from their service, on giving a month's wages or a month's notice. All these provisions being taken together, it appears to me that the agreement points clearly to an undertaking on the part of the masters to employ the workman for the seven years, subject to the notice, and on the part of the workman to serve them for that period on the same terms. That is a reasonable bargain,

having its foundation in a good consideration, namely, the agreement to employ him; and the amount or adequacy of that consideration the Court will not inquire into. The contract, therefore, is not void as being in restraint of trade, and, being binding on the parties, may be made the foundation of an action against the defendants for harbouring and employing the plaintiffs' servant. The rule must, therefore, be discharged.

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ROLFE, B.—This rule was granted on the ground that there was no corresponding undertaking on behalf of the masters to employ the workman: and when the case is looked at, it depends not so much on any principle relating to contracts in restraint of trade, as upon the principles relating to contracts in general; because, if it was a contract by the workman to work for the plaintiffs for seven years, and by the plaintiffs to employ him for that time, it clearly was not void as being in restraint of trade. The question therefore is, whether, on the face of this contract, there is an undertaking on the part of the plaintiffs to employ the workman: and, looking at the whole together, I think there is. The provision as to notice is conclusive to shew that the plaintiffs supposed that, by the other stipulations of the contract, they had agreed to employ him for seven years; else why should they introduce a power enabling them to do that upon notice, which, *ex hypothesi* of the other side, they might do without any notice? This distinguishes the case from that of *Aspden v. Austin*, where, as Lord *Denman* says in his judgment, the defendant had not covenanted to carry on his business for three years, but only to pay weekly sums for three years to the plaintiff, on consideration of his performing what, on his part, he had made a condition precedent. But here, subject to the condition of notice, I think the fair meaning of the whole contract is, that the parties did stipulate to do that, which, in the case of *Aspden v. Austin*, Lord *Denman* says they

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did not. It is, therefore, a contract by the masters to employ, as well as by the servant to serve, and consequently the ground of this motion fails.

PLATT, B.—The question is, what is the construction of this contract? The difficulty with me all along has been to see what is the limit of the engagement, if it be not seven years. That it is an engagement for no time at all, is inconsistent with all the provisions of it which have been referred to by my Brother *Alderson*. They are all inconsistent with the supposition of the absence of any undertaking on the part of the masters to employ the workman. I think, on the whole, it clearly amounts to an undertaking to employ the party, and to pay him the agreed wages, during the whole seven years, unless in the meantime the contract should be determined by notice. That distinguishes it from the cases in the Queen's Bench which have been cited by Mr. *Henderson*.

Rule discharged.

June 25.

JOWETT v. SPENCER.

Declaration in covenant stated, that plaintiff by indenture granted to defendant all the coals and mines of coal under certain lands; that defendant cove-

nanted to pay to plaintiff, as the price of the coal so granted, £40 for every statute acre of the said coal which should be found under the said lands; and until the said price should be fully paid, to pay plaintiff £40, part of the said price, in each year, by two equal half-yearly instalments, whether the whole of an acre of the said coal should be gotten in every such year or not.

Averment, that, at the making of the indenture, *there were* under the said lands divers, to wit, fourteen acres of the said coal, and that divers, to wit, thirteen acres of the said coal still remained under the said lands; and that £40, for two of the half-yearly instalments of the said price for the coal aforesaid, became due and still was in arrear and unpaid to the plaintiff:—*Held*, on motion in arrest of judgment, that the declaration was bad, for not averring that coals had been found under the premises.

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of coal, lying within and under a certain messuage and lands, situate &c., with the privilege of winning and carrying away the said coal; that, by the said indenture, the defendant covenanted with the plaintiff, his heirs, &c., that he, the defendant, his executors, &c., should and would pay to the plaintiff, as the price or consideration-money of the said coal, the sum of £40 for every statute acre of the said coal which *should be found* within or under the said messuage and lands, and should and would, until the said price or consideration-money should be paid as aforesaid, pay to the plaintiff the sum of £40, part of the said consideration-money, in each year, by two equal half-yearly payments, on the 3rd day of January and the 3rd day of July, whether the whole of an acre in any such year should be gotten or not. Averment, that at the time of the making of the said indenture, *there were* within and under the said messuage and lands divers, to wit, fourteen statute acres of the said coal, and that a large quantity, to wit, thirteen statute acres of the said coal still remain within and under the said premises; and that the sum of £40, for two of the said half-yearly instalments of the price for the said coal, became and was due and still is in arrear to the plaintiff.—Breach, non-payment thereof.

Plea, non est factum.

At the trial, before *Coleridge, J.*, at the last assizes at Liverpool, a verdict was found for the plaintiff, damages 40*l.* 1*s.* In Easter Term, a rule nisi was obtained for arresting the judgment, on the ground that the declaration was insufficient, for not averring, in the terms of the covenant, that coal *was found* under the demised premises. On a former day in these sittings (June 24),

*Addison* and *Hugh Hill* shewed cause.—The objection here is, that, although the declaration contains an allegation that there was and is coal under the demised premises, it is not averred that coal was found under the premises, the

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covenant being to pay the £40 "for every statute acre of the said coal which should be *found* within or under the premises." But in substance that is averred, although informally. The averment that coal *was* under the premises could not be proved at the trial, without its being found. The jury could not otherwise have assessed the damages at the sum of 40*l.* 1*s.* The informality, therefore, is cured by verdict, according to the rule laid down in *Stennel v. Hogg* (a). Upon a traverse of the averment that there was coal under the premises, the plaintiff must have proved some coal to have been found, which had not been paid for. But, further, the declaration states, not only that there was coal under the premises, but that two half-yearly instalments of the consideration-money were in arrear to the plaintiff, which could not be unless coal had been found, and was unpaid for; and that the defendant has admitted by his pleadings.

*Atherton*, (*Jervis* with him), contra.—The main object of this covenant clearly was, not that there should be a periodical payment of a rent at all events, but that at no time the whole of the payments should exceed the whole value of the coal *found*, which was estimated at £40 a statute acre. The word *found*, therefore, clearly means more than *existing*, because the mere existence of the coal under the premises would afford no measure of the payments. The covenant is then qualified thus: that, until the whole consideration-money is paid, the defendant shall pay £40 a year, whether the whole of an acre in any year be gotten or not; and it is upon this part of the covenant only that a breach is assigned. The plaintiff must shew a state of facts which entitles him to the money, the non-payment of which he alleges as a breach. He must therefore shew that the money is in arrear, for which purpose he must

(a) 1 Saund. 227, n. (1).

shew that coals have been *found*, and not paid for. That cannot be intended or inferred from anything stated in this declaration. With respect to the allegation that two half-yearly instalments became and were due and still are in arrear, that is a mere statement of the assumed conclusion of law from the facts before stated, which would not be traversable. In covenant for non-payment of rent, could the plaintiff recover by merely saying that there was a demise, and that rent remained due? The money not being due on the covenant itself, the plaintiff must add the extrinsic facts which entitle him to sue; and here the extrinsic fact essential for that purpose is that coal was found, which was not paid for. The "said half-yearly instalments" mentioned in the conclusion of the declaration, are those mentioned in the covenant, that is, instalments which are to be paid in a given event, namely, if coal be found under the premises, and until the coal found shall not have been fully paid for at a certain rate. It is said this is cured by the verdict; but that is not so; the issue joined had nothing to do with it, and the judge would not have allowed any evidence to be given as to the amount due. The issue being proved, the judge would merely look at the deed to see how many instalments were due. [*Platt*, B., referred to *Sicklemore v. Thistleton* (a), as in point.]

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Cur. adv. vult.

The judgment of the Court (b) was now delivered by

ALDERSON, B.—This was a motion in arrest of judgment. The declaration stated, that, by an indenture between the plaintiff of the first part, Jonathan Jowett of the second part, and the defendant of the third part, the said Jonathan Jowett, at the request and by the direction of the plaintiff, did grant unto John Spencer and the defendant,

(a) 6 M. & Sel. 9.

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(b) *Alderson*, B., *Rolfe*, B., and *Platt*, B.

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all the coals, mines, beds, veins, and seams of coal, under a messuage and lands, to hold the same to the said John Spencer and the defendant, their heirs and assigns, in equal shares, as tenants in common, subject to the covenants in the indenture contained; and that the defendant by the indenture covenanted, that John Spencer and he would pay unto the plaintiff, as the price or consideration-money for the coal granted, £40 for every statute acre of the said coal which should be found within or under the said messuage and lands; and, until the said price or consideration for the said coal should be fully paid, pay to the plaintiff £40, part of the said consideration-money, in each year, by two equal instalments, on the 3rd of January and the 3rd of July, the first payment to be made on the 3rd of January next after the date of the indenture, and whether the whole of an acre of the said coal should in every such year be gotten or not.

The declaration further stated, that, *at the time of making the said indenture*, there were, within and under the said messuage and lands, divers statute acres of the said coal, and that a large quantity, to wit, thirteen acres of the said coal, still remained within and under the said messuage and lands; and that a sum of money, to wit, £40, for two of the half-yearly instalments of the said price or consideration-money for the coal aforesaid, became and was due, and still was in arrear and unpaid.

The defendant pleaded non est factum, and another plea not affecting the present question. On these pleas issue was joined, and the jury found for the plaintiff. The question was whether, upon this finding, the plaintiff was entitled to judgment.

By the covenant, for the breach of which this action was brought, the defendant bound himself to pay £40 for every statute acre of the said coal which should be found within or under the said messuage and lands; and that sum yearly, by half-yearly instalments, whether the whole of

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an acre of the said coal should be gotten or not. On either branch of the alternative contemplated by the covenant, the finding of the coal was a condition precedent to the obligation to pay attaching. In order, therefore, to have shewn that the defendant had become liable to pay the £40 so reserved, the plaintiff should have averred in his declaration that coal had been found under and within the messuage and land. The averment that the coal was within and under the messuage and land, is quite consistent with its never having been found. The language of the second branch of the covenant, which provides for the annual payment of £40, whether the whole of an acre of the said coal should, in every such year, *be gotten* or not, shews that the parties to the deed intended that the word "found" should import more than the mere existence of the coal under and within the messuage and lands. Whether it is considered as having been used synonymously with "gotten," or "in a condition to be won," or any other state of the coal beyond that of its mere existence under and within the messuage and land, is unimportant. The necessity of the averment of its having been found still remains.

But it was contended by the plaintiff's counsel, that after verdict, the allegation that a sum, to wit, the sum of £40, for two half-yearly instalments, became and was due and still was in arrear, was sufficient to support the declaration, as it must be intended that in assessing the damages the jury must have founded the verdict upon the assumption that coal had been found. But in *Sicklemore v. Thistleton* (a), the Court of King's Bench held that that general averment was not sufficient, even after verdict, to supply the omission of stating those events, upon the happening of which alone the liability to pay attached. In that case, the defendant had executed, as surety for the lessee, the

(a) 6 M. & Sel. 9.



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counterpart of a lease. In the declaration he was stated to have covenanted generally that the lessee should pay the rents and perform the covenants by him to be paid and performed, and the breach assigned was, that rent was in arrear; but the deed having been set out upon oyer, the effect of which was to make it part of the declaration, the defendant's covenant appeared to be to pay on demand, in case the lessee should neglect to pay the rent for forty days after it became due. The declaration did not aver the demand on the expiration of the forty days, and on that ground the judgment was arrested, although the breach assigned in the declaration was, that three quarterly payments of rent were in arrear and unpaid, contrary to the defendant's covenant.

But the form of assigning the breach in the present declaration, by describing the money to be due as two of the said half-yearly instalments of the price or consideration-money for the coal aforesaid, limits it to the supposed average of instalments of the price for the coal previously described as being within and under the messuage and land; so that the breach, when expanded, might be read thus:— That, after the making of the indenture, and before the commencement of the suit, a sum of money, to wit, £40, for two of the said half-yearly instalments of the said price or consideration-money, for coal within and under the messuage and land, became and was due and still is in arrear and unpaid to the plaintiff, contrary to the tenor and effect of the defendant's covenant. This breach differs from the obligation assumed by the covenant, which was not to pay for coals existing within and under the messuage and land, but for such of them as should be found. The declaration, therefore, is bad, and the judgment consequently must be arrested.

Rule absolute.

1846.

## BOOTH v. MILLNS.

June 24.

**D**EBT by payee against maker of a promissory note for £100, made the 25th of January, 1844, payable to the plaintiff on demand, with interest, &c. Pleas, first, as to £50, parcel &c., and interest thereon, that the defendant made his said note for £100, and interest, instead of a note for £50, by mistake; secondly, that as to £50, parcel &c., and interest, the said note was made for the accommodation of the plaintiff; thirdly, as to the same sum, that the note was procured by the fraud, covin, &c., of the plaintiff; fourthly, as to £40, parcel of another sum of £50, payment. On all these pleas issues were taken and joined. Lastly, the defendant pleaded, as to the residue, payment into court of 14*l.* 10*s.*, with an allegation that the defendant was not indebted in a greater amount. This allegation was traversed by the replication, and issue was joined thereon.

At the trial, before *Patteson*, J., at the last assizes at York, the right to begin was disputed. The learned Judge ruled that the plaintiff was entitled to begin; and in summing up, he left it to the jury to say whether the defendant had made out his case on any of the pleas, and which party's witnesses were entitled to credit. The jury found a verdict for the plaintiff on all the issues.

*Pashley* having obtained a rule to shew cause why there should not be a new trial, on the ground that the defendant was entitled to have begun,

*Martin* now shewed cause.—The plaintiff was clearly entitled to begin in this case, because it lay upon him to shew that the defendant was indebted to him in a greater

In an action by payee against maker of a promissory note for £100 and interest, the defendant pleaded, as to parcel of the monies, pleas the issues upon which lay on the defendant; and to the residue, payment of a sum of money into Court, and that the defendant was not indebted in a greater amount; to which the plaintiff replied that the defendant was indebted to him in a greater amount, and issue was joined thereon:—*Held*, that the plaintiff was entitled to begin at the trial.

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amount than the sum paid into court. *Cripps v. Wells* (a) is precisely in point.—The Court called on

*Pashley*, in support of the rule.—The substantial issues in this case were all on the defendant. *Smart v. Rayner* (b) is in point. That was an action of assumpsit on bills of exchange, and on an account stated; the defendant pleaded, to the counts on the bills, pleas the affirmative of which were upon him, and to the account stated, non assumpsit; and the Court held, that the defendant was entitled to begin, unless the plaintiff stated that he had some evidence to give on the account stated. But, at all events, if the learned judge was correct in this case in ruling that the plaintiff was to begin, he ought to have told the jury that it was for the plaintiff to make out his case, and not for the defendant. *Mercer v. Whall* (c) has established that the mere form of the issue is not the criterion whereby this point is to be determined.

ALDERSON, B.—I think this rule ought to be discharged. The plaintiff was entitled to begin, an issue being upon him. Upon the issue on the replication to the fifth plea, the defendant would have been entitled to the verdict, unless the plaintiff had given some evidence; and that is the true test. I quite assent to the ruling of my brother *Rolfe* in *Cripps v. Wells*.

ROLFE, B.—I adhere to the rule which was stated by me in *Cripps v. Wells*. I own I think it is unfortunate that the Courts should ever have granted new trials on the mere question as to the right to begin at *Nisi Prius*. The main point is, whether the judge has directed the jury rightly as to the party on whom the burthen of *proof* lies. If the

(a) C. & Mar. 489.

(b) 6 C. & P. 721.

(c) 5 Q. B. 447.

issues are rightly put to the jury, we ought to presume that justice will be done.

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PLATT, B.—It seems to me that the rule laid down by my Brother *Rolfe*, in *Cripps v. Wells*, is the correct one, viz. that the plaintiff is to begin when the affirmative of the issue is upon him. That is the general rule. Here the issue is, whether the plaintiff is entitled to more damages than the sum paid into court; the affirmative of that issue he was clearly bound to prove (a).

Rule discharged (b).

(a) In the course of the argument, *Alderson*, B., adverted to a correction made by *Parke*, B., in the Exchequer copy of the report of the judgment of Lord *Abinger*, C. B., in *Huckman v. Fernie*, 3 M. & W. 517. The judgment, as printed, runs thus:—"We have no doubt as to the first point, that the Lord Chief Justice was right in ruling that the onus probandi was upon the plaintiff, and that he was bound to begin. We cannot agree, however, that this is a matter en-

tirely for the disposal of the judge at Nisi Prius. I cannot say that we should interfere in a very doubtful case, but if the decision of the judge *were clearly and manifestly wrong*, the Court would interfere to set it right." *Parke*, B., has substituted for the words in italics, "did clear and manifest wrong;" and has added this note in the margin:—"Qu. if this is not the true reading."

(b) See *Ashby v. Bates*, ante, p. 589.

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did not. It is, therefore, a contract by the masters to employ, as well as by the servant to serve, and consequently the ground of this motion fails.

PLATT, B.—The question is, what is the construction of this contract? The difficulty with me all along has been to see what is the limit of the engagement, if it be not seven years. That it is an engagement for no time at all, is inconsistent with all the provisions of it which have been referred to by my Brother *Alderson*. They are all inconsistent with the supposition of the absence of any undertaking on the part of the masters to employ the workman. I think, on the whole, it clearly amounts to an undertaking to employ the party, and to pay him the agreed wages, during the whole seven years, unless in the meantime the contract should be determined by notice. That distinguishes it from the cases in the Queen's Bench which have been cited by Mr. *Henderson*.

Rule discharged.

June 25.

JOWETT v. SPENCER.

Declaration in covenant stated, that plaintiff by indenture granted to defendant all the coals and mines of coal under certain lands; that defendant cove-

nanted to pay to plaintiff, as the price of the coal so granted, £40 for every statute acre of the said coal which should be found under the said lands; and until the said price should be fully paid, to pay plaintiff £40, part of the said price, in each year, by two equal half-yearly instalments, whether the whole of an acre of the said coal should be gotten in every such year or not.

Averment, that, at the making of the indenture, *there were* under the said lands divers, to wit, fourteen acres of the said coal, and that divers, to wit, thirteen acres of the said coal still remained under the said lands; and that £40, for two of the half-yearly instalments of the said price for the coal aforesaid, became due and still was in arrear and unpaid to the plaintiff:—*Held*, on motion in arrest of judgment, that the declaration was bad, for not averring, that coals had been found under the premises.

of coal, lying within and under a certain messuage and lands, situate &c., with the privilege of winning and carrying away the said coal; that, by the said indenture, the defendant covenanted with the plaintiff, his heirs, &c., that he, the defendant, his executors, &c., should and would pay to the plaintiff, as the price or consideration-money of the said coal, the sum of £40 for every statute acre of the said coal which *should be found* within or under the said messuage and lands, and should and would, until the said price or consideration-money should be paid as aforesaid, pay to the plaintiff the sum of £40, part of the said consideration-money, in each year, by two equal half-yearly payments, on the 3rd day of January and the 3rd day of July, whether the whole of an acre in any such year should be gotten or not. Averment, that at the time of the making of the said indenture, *there were* within and under the said messuage and lands divers, to wit, fourteen statute acres of the said coal, and that a large quantity, to wit, thirteen statute acres of the said coal still remain within and under the said premises; and that the sum of £40, for two of the said half-yearly instalments of the price for the said coal, became and was due and still is in arrear to the plaintiff.—Breach, non-payment thereof.

Plea, non est factum.

At the trial, before *Coleridge, J.*, at the last assizes at Liverpool, a verdict was found for the plaintiff, damages 40*l.* 1*s.* In Easter Term, a rule nisi was obtained for arresting the judgment, on the ground that the declaration was insufficient, for not averring, in the terms of the covenant, that coal *was found* under the demised premises. On a former day in these sittings (June 24),

*Addison* and *Hugh Hill* shewed cause.—The objection here is, that, although the declaration contains an allegation that there was and is coal under the demised premises, it is not averred that coal was found under the premises, the

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the defendant hath never had or received the said last-mentioned instalment, but hath always hitherto been ready and willing to suffer and permit, and hath always hitherto suffered and permitted, the plaintiff to have and receive of and from H. Graves & Co. so much of the said last-mentioned instalment as should amount to the said residue of the said sum in the said bill of exchange specified; and although the the said H. Graves & Co. have always hitherto been in solvent circumstances, and fully able to pay the said last-mentioned instalment, of all which premises the plaintiff then, to wit, on &c., had notice; nevertheless the plaintiff, of his own wrong, hath hitherto omitted and neglected to obtain and procure of and from the said H. Graves & Co. any part of the said last-mentioned instalment: by means of which said several premises the defendant hath become and is wholly exonerated, released, and discharged from the promise in the first count mentioned, and the performance thereof.—Verification.

There were similar pleas to the second and last counts.

Eighth plea.—As to the sum of £50, parcel of the monies in the *second and last* counts mentioned, the defendant says, that after the making the promise in those counts respectively mentioned, and before any breach thereof, and before the commencement of this suit, to wit, on &c., the plaintiff made his bill of exchange in writing, and directed the same to the defendant, and thereby requested the defendant to pay to the plaintiff, or order, £50 for value received, four months after the date thereof, and the defendant, at the request of the plaintiff, then accepted the said bill, and delivered the same to the plaintiff, who then accepted and received the same in discharge of the said sum of £50, parcel &c., and then indorsed and delivered the same to one W. Sharp, who from thence hitherto hath been, and still is, the holder thereof, and entitled to sue the defendant upon the same. Verification.

Ninth plea, as to the same sum, parcel, &c., that after the making of the said promise &c., and before any breach

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thereof, and before the commencement of this suit, to wit, on &c., the plaintiff made his bill of exchange in writing, and delivered the same to the defendant, and thereby requested the defendant to pay the plaintiff, or order, £50 for value received, four months after the date thereof, and the defendant, at the request of the plaintiff, then accepted the said last-mentioned bill, and delivered the same to the plaintiff, who accepted and received the same in discharge of the said sum of £50, parcel &c., and then indorsed and delivered the same to one W. Sharp, who then became and was the holder and entitled to payment thereof; that whilst W. Sharp was the holder and entitled to payment of the said last-mentioned bill of exchange, to wit, on &c., the defendant and one T. Kemp, at his request, and on his account and behalf respectively, paid to the said W. Sharp divers sums of money, in the whole amounting to the said sum in the said bill of exchange specified, and the same thereby then became and was fully paid, satisfied, and discharged.—  
Verification.

Replication to the first plea, that, in consideration that the defendant, with the assent of H. Graves & Co., and at the request of the plaintiff, would suffer and permit the plaintiff to have and receive of and from H. Graves & Co. so much of the said instalments of £40 as should amount to the said sum of money in the said bill of exchange specified, he the plaintiff did not agree to accept, receive, and take payment of the said bill of exchange from out of such instalments, and to discharge the defendant from the performance of the said promise in the said first count mentioned, modo et formâ.

There was a similar replication to the plea to the second and last counts.

Replication to the eighth plea, that the said bill of exchange in that plea mentioned became due and payable before the commencement of this suit, to wit, on &c.; and the defendant did not pay and has not paid the amount of the said bill, or any part thereof, although the same was



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duly presented to him for payment thereof before the commencement of this suit; and that the said W. Sharp, after the said indorsement of the said bill to him, and before the commencement of this suit, to wit, on &c., returned the said bill to the plaintiff, who thereby then became and was the holder thereof, and so remained and continued until and at the time of the commencement of this suit and still is the holder thereof.—Verification.

Replication to the ninth plea, that, whilst the said W. Sharp was the holder of the said bill of exchange in that plea mentioned, the defendant and the said T. Kemp, at his request, or on his account or behalf, did not, nor did either of them, pay to the said W. Sharp any sums of money, in the whole amounting to the said sum in the bill of exchange specified, or any part thereof, nor was the same paid and satisfied or discharged, as in the said ninth plea alleged; and the plaintiff in fact saith, that, although the said bill of exchange became due before the commencement of this suit, to wit, on &c., yet the defendant has not paid the same, or any part of the amount thereof; and that, after the indorsement of the said bill to the said W. Sharp, and before the commencement of this suit, to wit, on &c., the said W. Sharp returned the said bill to the plaintiff, who thereby became and was, and thence hitherto hath been, and still is, the holder of the said bill.—Verification.

Special demurrer to the replication to the first plea, assigning for causes, amongst others, that the same is calculated to embarrass and perplex, inasmuch as it is dubious and uncertain whether the plaintiff thereby means to put in issue the agreement or the consideration, or both the agreement and the consideration.

There was a similar demurrer to the replication to the plea to the second and last counts.

Special demurrer to the replication to the eighth plea, assigning for causes, amongst others, that it does not confess and avoid, or traverse and deny, the said plea; also that it is an argumentative denial of the allegation in the said plea,

that W. Sharp "hitherto hath been and still is the holder of the said bill, and entitled to sue the defendant thereon;" also, that the replication should have concluded to the country, and not with a verification; also for that it is admitted by the replication that the bill was accepted and received by the plaintiff in discharge of the said sum of £50.

Special demurrer to the replication to the ninth plea, assigning for causes, amongst others, that it does not confess and avoid, or traverse and deny, the said plea; also that it is an argumentative denial of payment to W. Sharp of the said bill; also that the replication should have concluded to the country, and not with a verification.—Joinders in demurrer.

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*Hurlstone*, for the defendant, in support of the demurrers.—The replications to the first two pleas are bad for uncertainty. They may mean that the plaintiff made the agreement, but not on the consideration laid, or may intend to put in issue both the consideration and agreement, or simply the agreement. Suppose issues taken on them, and that, at the trial, it appeared that the agreement was in fact made, but on a different consideration from that laid in the pleas, for whom could the issues be found? [*Parke*, B.—The replications seem bad, but are the pleas good?] They shew the extinguishment of the debt, by the agreement to receive it out of the instalments payable by H. Graves & Co. Mr. Chitty, Jun., in his work on Contracts (*a*), collects the cases, and states their result thus: "In *Tatlock v. Harris* (*b*), *Buller*, J., put this case—Suppose A. owes B. £100, and B. owes C. £100, and the three meet, and it is agreed between them that A. shall pay C. the £100, B.'s debt is extinguished, and C. may recover the same against A." [*Alderson*, B.—This plea, to be good, must shew such an agreement as would give a right of action against Graves

(*a*) 3rd edit. 613, 2nd edit. 482.

(*b*) 3 T. R. 180.

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& Co. *Parke*, B.—Though the plea alleges the agreement of the parties to have been *with their assent*, that may mean their assent to the agreement between the plaintiff and defendant, without agreeing to making themselves liable.] The plea goes further, and shews Graves & Co. to have acted on the agreement, by alleging that they paid the first instalment to the plaintiff. [*Alderson*, B.—They might be willing to pay the instalments, but such payment does not shew that they had agreed to be liable to an action in respect of them.] If the plea to the second and last counts be questionable, the plea to the first count is good, for it shews the agreement to have been made while the bill was running, and an acceptor's liability may be discharged by parol, even after breach: *Whatley v. Tricker* (a), *Parker v. Leigh* (b).

The replications to the eighth and ninth pleas are bad, for their argumentative denial that Sharp was the holder of the bill, and should have concluded to the country.

*J. Brown* was here called on in support of the replications.—The duplicity of the pleas compelled the plaintiff to reply the non-payment of the bill, *and* that Sharp returned it to the plaintiff; for if the indorsement to Sharp alone had been traversed, the defendant would have proved the fact. *Kearslake v. Morgan* (c) shews that it would have been enough to have proved a negotiable security to have been given “for and on account of” the debt: see also *Mercer v. Cheese* (d). But these pleas aver that the bill was received by the plaintiff in discharge of the debt, and also that he indorsed it to Sharp. Unless a plaintiff thinks proper to demur for duplicity of a plea, he must put both facts in issue: *Chitty v. Dendy* (e), *Bolton v. Cannon* (f). To have

(a) 1 Camp. 36.

(b) 2 Stark. C. N. P. 228.

(c) 5 T. R. 513.

(d) 4 M. &amp; Gr. 804.

(e) 3 Ad. &amp; E. 323.

(f) 1 Ventris, 272, relied on in Stephen on Pleadings, ch. II., sect. 3, rule 1. And see per Lord Abinger, 1 M. & W. 330: also *Smith v. Dixon*, 7 Ad. & E. 1;

replied that the bill was received "in discharge," might have admitted Sharp to be holder, for "discharge" is not necessarily "satisfaction:" *Emblin v. Dartnell* (a), *Maillard v. Duke of Argyll* (b). In *Fraser v. Welch* (c), the action was on the bill, not on the consideration, so that the plaintiff was implied to be the holder at the time the action was brought by the plaintiff. Had the replication in this case simply traversed Sharp's being the holder at that time, it would have been an immaterial traverse, and the declaration would have been said to have been answered by the rest of the plea.

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*Hurlstone*, in reply.—If the pleas are double, the plaintiff might have demurred specially; but if he does not do so, and replies double, he must not violate the rule against argumentative pleading. The plea in substance alleges, that Sharp was the holder of the bill at the time the suit was commenced. That is replied to by alleging that the bill was returned to the plaintiff, and that *he* was the holder at the commencement of the suit. That confesses, without avoiding, the averment of the plea. The replication should have concluded with a special traverse, absque hoc that Sharp was holder of the bill modo et formâ. [*Parke*, B.—That argument only applies to the issues on the second and last counts; and if plaintiff can recover on the first count, they need not be discussed]. The replications admit that Sharp was the holder of the bill, and then argumentatively deny it, by stating fresh matter, viz. that the plaintiff was the holder at the time of bringing the action. In *Fraser v. Welch*, Lord Abinger said (d), "I think Mr. *Erle's* argument is correct, that if a plaintiff, in his replication, selects

2 N. & P. 1, S. C.; *Gerten v. Robinson*, 2 Dowl. P. C. (N. S.) 41. But see *Moore v. Boulcott*, 1 Scott, 122; 1 Bing. N. C. 323; *Faulkner v. Chevell*, 5 Ad. & E. 213;

*Eden v. Turtle*, 10 M. & W. 635.  
(a) 12 M. & W. 830.  
(b) 6 M. & Gr. 40.  
(c) 8 M. & W. 629.  
(d) 8 Id. 635.

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one of many facts in a plea, for the purpose of trying the issue, and it is found for him, the other facts must be considered as expunged from the record." [*Parke*, B.—You say that, as the plaintiff did not demur specially to the plea, he might reply by answering both parts of it, if, instead of answering argumentatively, he had traversed that Sharp was the holder at the time the writ was issued.] The matters of defence were two; first, that a bill had been given, and next, that it was outstanding in Sharp's hands at the time of suing. [*Alderson*, B.—The mere giving back the bill by Sharp to the plaintiff, as alleged in the replication, does not shew the plaintiff to be the holder at the time of bringing the action, for he may have given it back.]

PARKE, B.—I am of opinion that the plaintiff is entitled to judgment on the first count. There were two pleas to that count. [The learned Baron stated them.] The first question is, as to the validity of the replications to those pleas. The replication is, that in consideration that the defendant, with the assent of Graves & Co., at the plaintiff's request, would suffer and permit him to have and receive of and from Graves & Co. so much of the instalments as should amount to the sum of money in the bill specified, the plaintiff did not agree to accept and receive the payment of the bill out of such instalments. Such being the replications, I think that the special demurrer as to them is well founded. The form in which the agreement stated in the plea is attempted to be denied, is ambiguous. The replication should have traversed the agreement in express terms. Here it is impossible to say whether the plaintiff means to put in issue the agreement or the consideration, or both.

I am also of opinion that these pleas are bad. If they admit a debt due, there is no good answer to the debt incurred by the acceptance. There is no averment that Graves & Co., by agreement with the plaintiff, con-

sented to become his debtors by substitution for the defendant, which allegation was necessary to make the pleading good by way of accord and satisfaction. If, indeed, there was an agreement between the three parties, by which Graves & Co. consented to substitute themselves for the defendant as debtors to the plaintiff, the plea would have been a perfectly good answer, without any allegation of payment. But the plea does not amount to that. It merely uses the words "with the *assent* of Graves & Co.," which is ambiguous, and is bad on that account. There is nothing equivalent to an express allegation that Graves & Co. agreed to pay the plaintiff the amount of the bill out of the instalments.

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Then it is sought to support the second plea to the first count, on the ground that the acceptance of a bill of exchange stands on a different footing from an ordinary debt, and may be discharged by parol admission of a debt due, in lieu of accord and satisfaction; but as between holder and acceptor, the law merchant requires a distinct waiver of the obligation of the acceptor; whereas this plea only attempts to set up another person as the debtor, and does not shew any express discharge of the obligation of the acceptor.

The other pleas are framed with great ingenuity, and put the plaintiff into great difficulty as to his replication. The first question is, whether the averment that the plaintiffs received the bill in discharge, means that the bill was delivered in full *satisfaction and discharge* of the debt; if so, the debt would have been altogether discharged, and the rest of the plea would have been immaterial. Mr. *Brown* has argued that the word "discharge" imports no more than that the bill was given "for and on account of" the debt, and therefore was no payment: and I think that is the true construction of the plea. Then the plea contains a double answer, inasmuch as it shews the delivery of a negotiable instrument for and on account of the debt, and also

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that the plaintiff indorsed it to Sharp. The question is, whether that is properly replied to. With respect to the first part of the pleas, the replications say nothing; but they answer both parts collectively, by shewing that the bill was dishonoured and returned to Sharp; the one plea, namely, the eighth, alleging that Sharp was the holder, and the other, namely, the ninth, that there was a payment to him.

On the part of the defendant it is said, that, the plea being double and yet replied to, the replication, if double also, should be correct according to the other rules of pleading, whereas these replications do not confess and avoid the averment that Sharp was the holder of the bill, but set up fresh matter instead. And it seems to me that they are bad on that account, and that they ought to have concluded with a formal traverse that, at the time of commencing the action, Sharp was the holder of the bill.

There will therefore be judgment for the defendant on the demurrers to the replications to the eighth and ninth pleas, and for the plaintiff on the rest.

ALDERSON, B.—I am of the same opinion. The replications to the pleas to the first count are clearly bad. It is left quite in doubt whether the consideration is admitted or denied, and whether the plaintiff did not agree simply, or did not upon that consideration agree. That ambiguity is pointed out by the special demurrer. The other pleas are bad, for the reasons already given.

ROLFE, B., concurred.

Judgment accordingly.

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**ASSUMPSIT** on two bills of exchange, with counts for interest, money lent, money paid, and on an account stated. Breach, non-payment. Damages, £1000.

The second plea was, that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the defendant and the plaintiffs accounted together of and concerning the said causes of action, *and all other claims and demands then being between the plaintiffs and the defendant*, and then amounting to certain large sums of money, to wit, £1000; and on that accounting, a certain small sum of money, and no more, to wit, the sum of £150, was then found to be and then was due and owing from the defendant to the plaintiffs, which sum of money the defendant then, in consideration of the premises, promised the plaintiffs to pay to them on request; and thereupon the defendant afterwards, and before the commencement of this suit, paid to the plaintiffs, who then accepted and received of and from the defendant, a large sum of money, to wit, £150, in full satisfaction and discharge of such last-mentioned sum so due and owing from the defendant to the plaintiffs as last aforesaid (a).—Verification.

Replication to the second plea, that the defendant did not pay to the plaintiffs, nor did the plaintiffs accept or receive from the defendant, the said sum of money in the said plea mentioned, or any part thereof, in such satisfac-

*July 4.*  
In indebitatus assumpsit for money due on an account stated, it is not sufficient to plead that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, defendant and plaintiff accounted together of and concerning the said causes of action, and all other claims and demands then being between plaintiff and defendant, amounting to a large sum, to wit, £1000, and that on such accounting a small sum, to wit, £150, was then found to be due and owing from defendant to plaintiff, which defendant then promised plaintiff to pay, and afterwards, before commencement of the suit, paid to plaintiff,

who accepted it in full satisfaction of the sum due to him from defendant; for such a plea does not shew that, at the time of the second accounting relied on, any cross demand by defendant against plaintiff existed, or that, if it existed, it had not been agreed to be given up by defendant in consideration of plaintiff's giving up some other demand of his on defendant, so as to make payment of the balance a satisfaction of the larger sum.

(a) As to this plea, see Com. *Down v. Hatcher*, 10 Ad. & E. Dig., tit. "Pleader" (2 G. 11); 121.

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tion and discharge as the defendant has therein alleged ; concluding to the country.

Special demurrer : for that the replication traverses immaterial allegations, and thereby offers an immaterial issue, in this, that the statement of the account as in the second plea mentioned having altered the nature of the demand in the declaration mentioned, and the plaintiffs own remedy being upon such contract of account, and the promise of the defendant thereupon made, and not upon the said several bills and contracts in the declaration mentioned, it is wholly immaterial and beside the merits of the plea and this action, whether the sum of money in the plea mentioned, or any part thereof, was paid, accepted, or received, as is by the said replication denied. Secondly, that the traverse taken in and by the same replication is not taken on the most material allegations or parts of said plea, but on matters which will not properly decide the merits of the same plea, and of this action. Thirdly, that if the accounting and promise in the last count, and the accounting and promise in the plea, are not one and the same accounting and promise, the plaintiffs ought to have newly assigned the statement of account by them in the declaration intended, and should have distinctly alleged in the replication that the several statements of account were other and different, and the replication should have concluded with a verification. Fourthly, that the replication does not answer the whole of the plea, in this, that the same plea contains two available defences to the said action—i. e. the accounting and the payment therein respectively alleged ; and both of the said defences should have been denied by the replication.—Joinder in demurrer.

*J. Henderson*, in support of the demurrer.—The replication is bad ; for the accounting disclosed in the plea is not stated in it to be of and concerning the matters laid in the declaration only ; whereas what the replication admits is

an accounting on all other claims and demands between the plaintiffs and the defendant, and a small balance found due from the defendant to the plaintiffs. [*Parke*, B.—You say the accounting laid in the plea respected claims by the defendant on the plaintiffs as well as by the plaintiffs on the defendant.] Yes; and that is a good answer to the declaration. In *Fidgett v. Penny* (a), *Alderson*, B., says, in law the second accounting must be taken to be either a payment or a set-off, and therefore must be pleaded specially. But opening a settled account, by pleading a set-off, after mutual concessions of particular items, would be inconvenient. A new state of things arises on that second accounting; for there is a difference between a mere adjustment of the plaintiffs' demand or single claim, and an adjustment of all claims between the parties. In *Comyns' Digest*, Action on the Case on Assumpsit (G.), it is said, "If A. be indebted to B., and afterwards they come to account for all matters between them, this is a discharge of the debt." *Milward v. Ingram* (b) is cited, where it was held, that a simple contract to pay a debt might before breach be discharged by the debt being allowed on an account subsequently stated, with a promise to pay the balance then found due. In *Foster v. Allanson* (c), *Buller*, J., says, that settlement of a partnership account on dissolution is in law sufficient consideration for a promise to pay the balance struck (d), and that such promise puts an end even to a partnership covenant to adjust and make a

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(a) 1 C. M. & R. 108; 4 Tyr. 650; 2 D.P.C. 714. See per *Holt*, C. J., *May v. King*, 12 Mod. 538, 539; 1 Ld. Raym. 680, *S. C.* Also, as to mistakes in an account stated, 2 Freem. 62, 183. *Thomas v. Thomas*, 8 M. & W. 140; Tyrwhitt's Pleading, 274.

(b) 1 Freem. 195; 1 Mod. 205; 2 Mod. 43, *S. C.* See per Lord *Holt*, in *May v. King*,

as reported 12 Mod. 538, 539; also *Price v. Dyer*, 17 Ves. 363.

(c) 2 T. R. 479, 483.

(d) In that case an express promise by defendant to pay a balance was proved. So in *Moravia v. Levy*, 2 T. R. 483, n. But *Gibbs*, C. J., held at Nisi Prius, that no such express promise was requisite, *Rackstraw v. Imber*, *Holt's C. N. P.* 368.

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final settlement of accounts at the expiration of the term. The stating an account alters the nature of the evidence in the case. The replication would be sufficient, if the accounting only had been traversed.

Sir *John Bayley*, in support of the replication, was stopped by the Court.

PARKE, B.—It appears from *Atherley v. Evans* (a), that the case of *Milward v. Ingram* has frequently been denied to be law. The fault of this plea is, that it does not shew that at the time of the second accounting *any* cross demand existed by the defendant against the plaintiffs, or that, if it so existed, it had not been agreed by the defendant to be given up, in consideration of the plaintiffs giving up some demand of theirs against the defendant, so as to make the payment of a smaller sum, viz. the balance, a satisfaction of a larger by way of payment (b). Nor does it appear that there were any other claims by the plaintiffs on the defendant, beyond those comprised in the account stated which is declared on. In order to make the plea good, as resting on the defendant's new promise merely, it should have alleged, that after the accruing of the causes of action laid in the declaration, and before the commencement of the suit, an account was stated between the plaintiffs and the defendant, of and concerning the said causes of action, and of and concerning other demands of the plaintiffs against the defendant, and a certain other demand of the defendant against the plaintiffs; but a plea merely alleging an account to have been stated between

(a) Sayer's Rep. 269. See 1 contract cannot extinguish another.  
 Ld. Kenyon, 250. Acted on in  
*Roades v. Barnes*, 1 Burr. 9.  
 Held, that an account stated was  
 no plea to a demand for a debt  
 of the same nature, as one simple

(b) See *Down v. Hatcher*, 10  
 Ad. & E. 121; *Thomas v. Heathorn*, 2 B. & C. 477, as restated  
 in 4 Ad. & E. 270.

the parties respecting the causes of action declared on, would be bad, unless payment of the balance found due (a) was averred. We are all of opinion that the rest of the plea affords no answer to the action; and as the objection to the plea is one of substance, which might be taken on general demurrer, the judgment must be for the plaintiff.

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ALDERSON, B., and PLATT, B., concurred.

Judgment for the plaintiff.

(a) Or a release. See Com. Dig. tit. "Pleader" (2 G. 11). *Scarborough, Mayor, &c. v. Butler*, 3 Levin. 237.

The ATTORNEY-GENERAL v. HALLING & Others.

June 25.

THIS was an information in the nature of a bill, filed by the Attorney-General on the equity side of this Court. It stated that, by the Customs Regulation Act, 3 & 4 Will. 4, c. 52, it was enacted, that every importer of any goods should, within fourteen days after the arrival of the ship importing the same, make perfect entry inwards of such goods, or entry by bill of sight, in manner thereafter provided, and should within such time land the same; and in default of such entry and landing, it should be lawful for the officers of the customs to convey such goods to the king's warehouse. The information then set forth the other enactments of the same statute, requiring the importers to deliver to the collector or controller a bill of entry of the goods, and to pay down the duties payable on the goods therein mentioned, &c., allowing in certain cases an entry by bill of sight, on which the goods should be provisionally landed, and providing for the subsequently making a full and perfect entry thereof, &c. &c.; and also the provisions

The equity jurisdiction of the Court of Exchequer as a Court of Revenue, is not taken away by the stat. 5 Vict. c. 5.

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of the Customs Duties Act, 3 & 4 Will. 4, c. 56, imposing certain duties of customs on the importation of manufactures of wool, not being goats' wool, and other manufactured goods, and of the 3 & 4 Vict. c. 17, by which an additional duty of £5 per cent. was charged upon the produce and amount of all the duties and revenues of customs and excise charged and collected under the management of the Commissioners of Customs and Excise, with certain exceptions therein mentioned. The information then stated, that during the months of July and August, 1841, the defendants carried on the business of dealers in French and foreign silk, &c. in Cockspur-street, Westminster, and were, by themselves and their agents, in the habit of importing from France, and elsewhere abroad, consignments of silk, &c., upon all of which true and perfect entries ought to have been duly made upon the importation into this kingdom, for the purpose of enabling the duties of the customs due thereon to be duly collected; that they employed Messrs. Christopher & Co. as their agents, to make or cause to be made on their behalf, as the importers of such goods, the necessary entries inwards of goods so consigned to or imported by them, and cause the necessary duties to be paid thereon; that, on the 5th July, 1841, a package or case of goods, marked H. P. S. 354 (the said letters being intended to denote the ownership of the defendants, as being the initials of the defendants' firm), arrived in the port of London on board a vessel called the "Harlequin," &c., which was imported by and consigned to the defendants. It then stated the entry and bill of sight made by the defendants' agents on the importation of these goods, the warrant granted thereon by the collector and controller, and the perfect entry made thereon by the defendants' said agents of such goods, as consisting of goods manufactured, of the value of £31, and of manufactures of wool, not goats' wool, of the value of £50; and alleged that the officer of customs, whose duty it was to have checked

such entry, and to have seen that it was a true and perfect entry, being in collusion with the said agents, and with the defendants, permitted it to be passed without any due and proper check, and in collusion with the defendants made an entry of the contents of the package in the blue book, stating that the contents consisted of 187 ells de Laine, 540 ells do. do., worked manufactures of value, and of 67 shawls and 30 shawls, being goods made up at value, and which entry in the said blue book was a false and collusive entry, and was not a true and correct entry of the goods contained in such package, upon which duty ought to have been estimated and paid. The information then proceeded to state, that the duty paid on such entry was only 14*l.* 7*s.* 9*d.*, whereas the package contained a much larger quantity of the same description of goods, and of other articles, on which an entry ought to have been made and duties paid, and that the amount of the duty payable thereon by the defendants amounted to £140 beyond the amount actually paid; which was and is a debt still due from the defendants to her Majesty, and which duties so unpaid ought to be accounted for and paid to her Majesty, in respect of the duties so payable and withheld by the defendants.

The information set forth several other transactions of the same nature, and stated that applications had been made to the defendants for payment of the duties remaining unpaid in respect of the goods so imported by them as aforesaid, and to come to a fair account in respect thereof, but that the defendants had refused to do so, and pretended that the goods did not belong to them, and were not imported on their behalf, &c. &c. It then prayed a discovery as to this and all other matters relating to the premises, and that an account might be taken of the said duties, &c., and that a writ or writs of subpoena might issue, commanding the defendants to appear and answer, and perform the decree of the Court.

To this information two of the defendants, after pro-

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testation that they did not confess or acknowledge all or any of the matters and things therein set forth to be true, as set forth and alleged, demurred, and for cause of demurrer said, that the Court of Exchequer, wherein the said information was filed, hath not any jurisdiction in or over all or any of the matters and things in the said information set forth or referred to, and in respect whereof discovery and relief was sought from and against the defendants; and that the information made out no case to entitle the Attorney-General to any discovery or relief, &c.—The Attorney-General joined in demurrer.

The case was argued at great length in Trinity Term 1845 (June 10 and 11) (*a*), by *James Parker* and *Bagshawe*, for the defendants, in support of the demurrer, and by *Jervis*, *Wray*, and *J. Wilde*, for the Crown: the question discussed being how far, by the stat. 5 Vict. c. 5, s. 1 (*b*), the equity jurisdiction of the Court of Exchequer in *matters of revenue* was taken away. On the part of the defend-

(*a*) Before *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

(*b*) Which enacts, “that on the 15th day of October, 1841, all the power, authority, and jurisdiction of the Court of Exchequer as a Court of Equity, and all the power, authority, and jurisdiction conferred on or committed to the said Court by or under the special authority of any act or acts of Parliament, (other than such power, authority, and jurisdiction as shall then be possessed by or be incident to the Court of Exchequer as a Court of law, or as shall then be possessed by the said Court of Exchequer as a Court of revenue, and not heretofore exercised or exerciseable by the same court sitting as a court of equity),

shall be by force of this act transferred and given to her Majesty’s High Court of Chancery, to all intents and purposes, in as full and ample a manner as the same might have been exercised by the said Court of Exchequer, if this act had not been passed; and the same power, authority, and jurisdiction shall, so far as respects the exercise thereof by the said Court of Exchequer, cease and determine: Provided always, that this act shall not abridge, lessen, or in anywise affect the power, authority, or jurisdiction of or incident to the said Court of Exchequer as a court of law, or the power, authority, or jurisdiction of the same court as a court of revenue, not exercised or exerciseable by the same court sitting as a court of equity.”

ants, the judgment of the Master of the Rolls, in the case of *The Attorney-General v. The Corporation of London* (a), was cited and relied upon. The arguments and authorities are so fully stated in the judgment of the Court, that it appears to be unnecessary to report them in detail.

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The judgment was now pronounced by

POLLOCK, C. B.—This was a proceeding by information, filed the 21st of February, 1845, by the Attorney-General, on behalf of the Crown, in a matter of revenue.

The information set forth several provisions of the Customs Acts of the 3 & 4 Will. 4, and the 3 & 4 Vict., by which certain duties became payable on the importation of the goods mentioned in the tables of the said acts. And in substance it charged, that the defendants were the real importers of various goods liable to duty, which had not been paid; that they ought to set forth the quantities and value of the goods so alleged to have been imported, and the circumstances of the importation of the said goods, and generally of any goods imported liable to duty within certain times specified; and in order to obtain the said duties alleged to remain unpaid, it prayed for a writ or writs of subpoena, directed to the defendants, commanding them to appear and answer, and perform the decree of the Court.

To this information two of the defendants, on the 3rd of March, 1845, demurred, assigning for one cause (amongst others) that the Court of Exchequer hath not any jurisdiction in or over all or any of the matters and things in the said information set forth or referred to, and in respect whereof discovery and relief are sought for against them; and the only point insisted upon and argued before us was, whether the equitable jurisdiction of this Court, in a case like the present, was wholly transferred to the Court of Chancery.

(a) 14 Law J., N. S., Ch., 305.



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This case was argued before myself and my Brothers *Alderson, Rolfe, and Platt*, and we have now to pronounce the judgment of the Court.

The question turns upon the construction of the recent stat. 5 Vict. c. 5, s. 1.

Prior to that statute, there can be no doubt that the Court had power and jurisdiction to entertain such an information; but it is contended by the defendants, that the effect of the statute referred to is to transfer *all* equity jurisdiction of every kind (whether in matters of revenue or in other matters) to the Court of Chancery, and that this Court now possesses no authority or jurisdiction but what belongs to or is incident to it as a court of law, or as a court of revenue not proceeding after the forms of a court of equity.

If this be the true construction of the statute, the defendants are entitled to the judgment of the Court; if not, judgment must be given for the Crown.

The case was very elaborately and learnedly argued, and the history of the jurisdiction of this Court was gone into with much research to a very remote period. Mr. *Parker*, for the defendants, contended, that the jurisdiction of the Court might conveniently be considered under four heads: first, the common law jurisdiction; secondly, the revenue jurisdiction; thirdly, the equity jurisdiction; and fourthly, the special jurisdiction conferred by various acts of Parliament: and that the effect of the statute has been to take away the last two heads, leaving only the common law and the revenue jurisdiction, and the latter deprived of any equity jurisdiction whatever. Mr. *Jervis*, on the other hand, contended for the Crown, that there was in this Court a revenue equity jurisdiction distinct and apart from its jurisdiction as a court of equity, and that the revenue equity jurisdiction remains, although the ordinary equitable jurisdiction has been transferred to the Court of Chancery: and that is the point upon which we have to give our opinion.

There is no doubt that, originally, this Court of Exchequer was a court of revenue alone; and that, as a court of revenue, from time immemorial, it has exercised, for the proper collection and enforcement of the revenue, powers of various descriptions. It has been in the constant habit of proceeding both after the forms of the other courts of common law, and in the manner also of a court of equity. The "course of the Exchequer," involving both these modes of procedure, is part of the ancient and general law of the realm.

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Out of this state of things, in very ancient times, an extension of the jurisdiction of the Court (in fact, an usurpation, resisted for some time, but at length acquiesced in) took place. Inasmuch as the officers of the Court and the debtors of the Crown were entitled to use for their own purposes the forms of procedure belonging to the courts, it became the practice, by a suggestion of that fact, which suggestion was not allowed to be traversed, for others, not being officers of the Court or debtors of the Crown, to avail themselves of the privilege. Accordingly, by means of the writ of quo minus, a general common law jurisdiction was introduced; by a similar suggestion bills in equity were filed, so as to make the Court practically a court of equity between subject and subject: for the course of the Exchequer involving both a form of legal and equitable procedure, the usurped jurisdiction naturally divided itself in this way; and after so dividing itself, the branches became gradually entirely separate, and formed two separate sides, the plea side and equity side of the Court,—the revenue, however, still remaining as before, and involving both. Subsequently to this, and in very modern times, the writ of quo minus was abolished, and the usurped jurisdiction of this Court in common law was taken away. But, at the same time, the writ of summons was given, and so a real common law jurisdiction was legally conferred on this Court by statute. The usurped equity jurisdiction of the

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Court, however, remained as before, and also its proper equity jurisdiction, in ease of those who, being officers of the Court or debtors really of the Crown, chose to avail themselves of it. In consequence of the increase of the business of the Court of Exchequer, it became, however, necessary, in the year 1819, to subject this equity jurisdiction to certain regulations; and accordingly, by the 57 Geo. 3, c. 18, the Lord Chief Baron, or in his absence one of the puisne Barons, was enabled to sit alone in causes in equity between subject and subject: and again, by the 1 Geo. 4, c. 35, an accountant-general and one other equity Master were appointed, for the further regulation of that branch of the Court, and these newly appointed officers were by that act made also available in aid of those officers who up to that period had exclusively superintended all matters of revenue. There were two subsequent acts, 3 & 4 Will. 4, c. 41, and 6 & 7 Will. 4, c. 112, by which the appointment of one of the puisne Barons to sit alone, and assist the Lord Chief Baron in these matters of equity, was further regulated.

The exact state of this Court, therefore, at the time when the 5 Vict. c. 5, was passed, was, that in the Exchequer there was a court of revenue, held before the Treasurer, the Chancellor of the Exchequer, and the Barons, exercising for the due collection of the revenue a procedure after the forms of a court of equity, and a court of revenue held before the Barons, exercising the forms of procedure proper to the other courts of common law, both however having certain peculiarities familiarly known by the term "*cursus scaccarii*;" and that, annexed to and as a part of this general revenue court, there were incidentally courts of equity and of common law for its officers and the real crown debtors. And that, further, an ancient though originally usurped jurisdiction was exercised by it as an ordinary court of equity between subject and subject; and that by statute (abolishing a similarly usurped jurisdiction at common law between subject and subject), there existed a

court of common law, which, like the other superior courts of common law, exercised incidentally certain equitable powers of interpleader and the like, some of which had been previously conferred on all those courts by various statutes, and others had been by common law exercised as parts of their practice from time immemorial.

This statement we have been anxious to premise, because this previous knowledge seems to us to be essential, and to afford the true key to the interpretation of the act 5 Vict. c. 5; in which interpretation we have the misfortune to differ from Lord *Langdale's* judgment, in the case of the *Attorney-General v. The Corporation of London* (a).

Then what did the statute of 5 Vict. c. 5 do under these circumstances? The words are, "that all the power, authority, and jurisdiction of the Court of Exchequer, as a court of equity, and all the power, authority, and jurisdiction conferred on or committed to the said court by or under the special authority of any act or acts of Parliament, other than such power, authority, and jurisdiction as shall be then *possessed by, or be incident to*, the Court of Exchequer as a court of law, or as shall then *be possessed* by the said Court of Exchequer as a court of revenue, and not heretofore exercised or exerciseable by the same court as a court of equity," shall be transferred to the Court of Chancery. Now it is plainly our business to construe these words so as, if possible, to give effect to all of them, and to adopt the most literal construction which does not lead to contradiction or absurdity.

First, then, we find, by the words in the commencement, that all jurisdiction as a court of equity, and all jurisdiction conferred on the Exchequer by statute, is taken away. This would, if taken literally, have abolished the writ of summons given to the Exchequer by statute, and would have reduced this Court to its ancient jurisdiction as a mere

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court of revenue. But this is immediately restrained by an exception; and then the question is, what does the exception contain? It is there we are to look to find the reserved jurisdiction of the Exchequer. The first exception is of all powers possessed by *or incident to it* as a court of law: an exception, in fact, out of the last branch—powers conferred by statute on the Court of Exchequer. Therefore it has all the powers, legal and equitable, which by statute or common law belong to the other superior courts of common law. The second exception is of all powers possessed by it as a court of revenue. Now, this must refer to its peculiar legal and equitable powers; for the previous reservation had already included all the powers, both legal and equitable, belonging to it by statute as a mere court of common law. If the second exception, however, had stopped there, it would have been almost as large as that out of which it was made; for the jurisdiction of the Court of Exchequer, originally exercised after the forms of common law, and all its equity jurisdiction, arose, either rightfully or by usurpation, out of its jurisdiction as a court of revenue. Its existing common law jurisdiction between subject and subject did not, and had therefore previously been saved. Consequently, the words on which the whole question turns were added,—“not heretofore exercised or exerciseable by the same court as a court of equity.” What, therefore, do these words mean? Now, when we find that the Court of Exchequer had used its forms of equitable procedure from time immemorial, not merely for the collection of the revenue, its proper duty, but also as a court of equity for its officers and crown debtors in their ordinary affairs, and further, by a suggestion not allowed to be traversed, for all the subjects of the realm, we think the only correct meaning of the whole reservation is, that the legislature take from the court of revenue this incidental jurisdiction, which it exercised as a mere court of equity, and confine its jurisdiction in future to the mere collection of

the revenue of the Crown, but with all the powers which from time immemorial it has exercised for that particular object.

And there are many considerations which induce us to come to this conclusion. In the first place, it is not strictly correct to say of this Court, that, in matters of revenue, it sits as "a court of equity." It sits as a court of revenue, having ancient forms of equitable procedure. We give, therefore, full effect even to the proper literal construction of every word of the clause. But, secondly, the officers of the Exchequer, whose presence is necessary to our procedure, are retained. The Chancellor of the Exchequer remains the head of our Court; and yet, if all our equitable jurisdiction be abolished, we know not by what authority he can ever take his seat, as all Chancellors of the Exchequer heretofore have done, on our Bench; for the common-law jurisdiction of the Exchequer is before the Barons alone, even in cases of revenue: it is the revenue jurisdiction in equity which is held before the Treasurer, Chancellor, and Barons. Thirdly, if our construction be erroneous, it will follow that some most valuable powers, essential to the just collection of the revenue, and the ease of the subjects of this realm, will be lost to them. As early as the reign of Henry the Second, the objects of the superior Exchequer, as a court of revenue, are stated in the *Dialogus Scaccarii* of the Red Book, in the custody of the Queen's Remembrancer, thus:—"Ut Regis utilitati prospiciant, salvâ tamen æquitate:" and accordingly, the books on the subject of our practice lay it down, that, in our Court, the justice done to the public is attempered with a salvo of private rights and equities, and that the foundation of the equitable discretion and moderative power of the Barons, is traceable to sources more remote than any writs from the Royal grace, or any acts at present extant emanating from the legislature. Thus, cases repeatedly occur in our ancient records of purely equit-

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able beneficial proceedings, founded on the ancient law and custom of the Exchequer, upon mere equitable prayer, and permitted expressly in consideration of the equity raised, and often disclosed on summary proceeding. Thus, again, all kinds of equitable matter raised either on suggestion, petition, or plea, were dealt with, and parties furnished with summary means of asserting their rights against the Crown, and having the matter determined at once by the Court, in a way wholly dissimilar to the practice of any other court, and presenting a peculiar union of legal and equitable procedure. This summary exercise of the Court's authority, in ease and equitable relief of the subject, wherein their interference would appear by the precedents to be almost without limit, is intimately connected and bound up with the inherent equity of the jurisdiction of the Court of Revenue. Therefore, both by the peculiar comprehensiveness of the power of pleading in revenue, and the equitable interference of the Court by summary motion on all sorts of equities shewn, a very important security to the subject, in matters otherwise of very stringent and almost arbitrary proceeding, as well as great facility and saving of time to the Crown, mainly depend on this inherent equity in revenue. And besides all this, the terms of reference to the Queen's Remembrancer, under which he admits all kinds of equities in his adjudications, and is generally armed with commission to examine witnesses on interrogatories and the like, which are generally couched in terms similar to references in Chancery, though in his case made in a summary way, also materially depend on this equitable power of the Revenue Court in the Exchequer. Again, by the 33rd Hen. 8, c. 39, the judges of this Court, who have the care of its equitable procedure, are empowered to relieve the subjects from recognizances and bonds, upon proper proof, and to relieve persons who can shew sufficient cause, in reason and good conscience, in bar of any debt or duty to the Crown. Now Lord *Coke* puts this, in the 4th Inst. 118,

as one of the duties of this Court as a court of equity. We think it never could have been the intention of the legislature to leave this Court, as a court of revenue, with a maimed and insufficient authority to decide equitably in matters of revenue between the Crown and subject, and to send the subject into the Court of Chancery for such relief, leaving him, however, to be charged in the Court of Exchequer, and thus subjecting him, therefore, to be harassed by an application to both Courts. Nor would it, we think, be very seemly for the Court of Chancery to interfere, in a matter of revenue, with a Court which from time immemorial has held exclusive jurisdiction in such matters, and this, too, in cases in which the Court of Chancery must itself govern its proceedings by precedents to be found only in our records. Fourthly, the contrary construction would limit the Crown in the choice of its court, and would reduce it to the situation of being unable to obtain full justice in one court alone. This very case shews it. Here is a proceeding to recover duties: hitherto, the Crown, by information, has been enabled to obtain a discovery necessary to its proceedings in the same court where it is suing for duties. The present contention is, that the Crown should no longer have that convenience, but that it should obtain discovery in Chancery, and redress in the Exchequer.

Upon considering, therefore, all these circumstances, we have arrived at the conclusion, that the construction of the 5 Vict. c. 5, s. 1, which is the literal one, and which avoids all these inconveniences, is also the true one, and that the Court has, notwithstanding that act, retained all its actual and incidental jurisdiction, equitable as well as legal, which it has as a court of common law, and has retained also all its proper jurisdiction as a court of revenue, for the collection of the revenues of the Crown, whether the jurisdiction be exercised after the forms of common law or equity: but that it has lost all jurisdiction as a court of equity between its officers and Crown debtors, and the

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other subjects of the realm, which was before incident to it as a court of revenue, and was exercised by it as a mere court of equity; and further, that it has lost all its usurped jurisdiction as a court of equity, between subject and subject, a jurisdiction which, though not really incident to it, was, nevertheless, at the time when the act passed, exercised de facto by it as a mere court of equity in the court of revenue.

The result is, that we have not arrived at the same conclusion at which Lord *Langdale* arrived in the case of *The Attorney-General v. The Corporation of London*. It is due to that learned judge to say, that, so far as appears from the report of the case and his judgment, these matters were never fully brought before his notice. We have, however, from respect to his authority, considered very deliberately the whole case, which very probably may not rest here, but will be carried to the highest tribunal for final determination.

We cannot but think that, if even it should turn out that our construction is erroneous, this Court will not be left by the legislature so powerful for the charge, and so impotent for the relief, of the subject, as Lord *Langdale's* view of the statute would leave us.

We think that this demurrer must be overruled, and that there must be judgment for the Crown.

Judgment for the Crown.

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## HUGHES v. HUGHES and Others.

**T**RESPASS for breaking and entering the dwelling-house, outhouses, barns, and stables of the plaintiff, at &c., breaking the doors and locks thereof, and expelling him therefrom, &c. The second count was in trespass de bonis asportatis; and the third charged the defendants with breaking and entering certain closes of land of the plaintiff, and depasturing the same, &c. Pleas:—first, not guilty; secondly, to the first count, that the said dwelling-house, &c. were not, at the said time when &c., the dwelling-house, &c. of the plaintiff; thirdly and fourthly, similar pleas to the second and third count; fifthly, leave and license; and lastly, that the dwelling-house, outhouses, &c., in the first count mentioned, and the closes in the third count mentioned, were the dwelling-house, &c., closes, soil, and freehold of Edmund Edward Meyrick, and that the defendants committed the trespasses in those counts mentioned as his servants and by his command; and in so doing seized and took the goods in the second count mentioned, which were incumbering the dwelling-house, &c. The plaintiff joined issue on the first, second, third, and fourth pleas; to the fifth replied de injuriâ; and traversed the title of E. E. Meyrick alleged in the last.

At the trial, before *Williams, J.*, at the last assizes for the county of Anglesey, it appeared that the house and lands in question had been occupied for many years by Ellen Hughes, the mother of the plaintiff, as tenant from year to year, first to Miss Ann Meyrick, and afterwards to Mrs. Mary Meyrick, who were successive tenants for life under the will of Mr. Thomas Meyrick, the former, Ann, claiming also an ultimate reversion in fee under the same will. Mary Meyrick died in 1841, and Ellen Hughes was thereupon required, by the agent of Mr. Edmund Edward Meyrick (who claimed the property as the devisee of Ann

Where, in trespass, there were several issues, one of them on a plea of lib. ten., and the Judge at the trial improperly rejected evidence applicable to that issue only, the Court discharged a rule for a new trial, after a verdict for the defendant on several issues, on his consenting to the verdict being entered for the plaintiff on that issue; and gave no costs of the rule to either party.

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Meyrick), to pay rent to him. She did so until her death on the 3rd of June, 1844. In May, 1844, Mr. Meyrick gave her notice to quit the farm on the 13th of November following, the usual period of quitting in that part of the country. The plaintiff resided with his mother on the farm, and continued to occupy it after her death. On the 30th of September, 1844, Mr. Meyrick, by his agent, demanded and received from the plaintiff the sum of £60, being the year's rent of the farm due at Michaelmas, which, in the receipt given to the plaintiff, was stated to be received from him, being "executor of the late Ellen Hughes." About the same time, Mr. Meyrick re-let the farm, from the 13th of November following, to Owen Hughes, one of the defendants. The plaintiff (who had himself made proposals to Mr. Meyrick to retake the farm, which were refused) accordingly made preparations for his removal to a house and shop at Holyhead, to which he in fact removed almost all his furniture before that day. He also sold off all his farming stock, except one cow, which he kept upon the land; and he likewise bargained with the defendant, Owen Hughes, for the sale to him of potatoes and other crops growing upon the land. On the 15th of November, the defendant Owen Hughes, accompanied by the other defendants, came to the house to bring in his furniture, but found the doors and windows fast, which he forcibly opened for the purpose of taking possession of the house; and he also turned his cattle out into the fields. These were the trespasses complained of in this action.

It was alleged, on behalf of the plaintiff, that Ann Meyrick had no interest in the premises which she could devise to E. E. Meyrick; and upon the agent of that gentleman being called as a witness for the defendant, to prove the letting by him to Ellen Hughes, the payment of the rent, &c., the plaintiff's counsel proposed, in cross-examination, to prove by him the seisin of Thomas Meyrick, the making of his will, and other facts

shewing a title in the property adverse to that of Mr. Edmund Edward Meyrick. The defendant's counsel objected that this course of examination could not be pursued, inasmuch as, by the payment of rent to Mr. Meyrick, and the other facts proved, his title had been conclusively admitted by Ellen Hughes and by the plaintiff. The learned Judge was of that opinion, and accordingly rejected the evidence; and the defendant obtained a verdict on all the issues except the first.

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In Easter Term, *Jervis* obtained a rule nisi for a new trial, on the ground that the evidence above mentioned had been improperly rejected by the learned Judge.

*Townsend* and *W. Yardley* now shewed cause, and contended, first, that the ruling of the learned Judge was right, and that the plaintiff was estopped to deny the title of Mr. Meyrick. The Court (*a*), however, were clearly of opinion that the evidence was admissible, there being no proof, on the notes of the learned Judge, of a fresh taking of the farm from Mr. E. E. Meyrick.—The learned Counsel then urged, that all that the plaintiff could be entitled to upon this rule was to have the verdict entered for him upon the second, third, fourth, and sixth issues, the defendant retaining his verdict upon the issue on the plea of leave and license, as to which it was not alleged that there had been any misdirection; and they referred to the case of *Moore v. Tuckwell* (*b*), as a direct authority to this effect.

*Jervis* and *Welsby*, contra, insisted that the plaintiff was entitled, ex debito justitiæ, to a new trial upon the whole record, as upon a venire de novo. They distinguished *Moore v. Tuckwell*, on the ground that there the misdirection was

(*a*) *Parks*, B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

(*b*) 1 C. B. 607.

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only as to one item of the plaintiff's demand, not as to the whole of one of the issues on the record; and cited *Earl of Macclesfield v. Bradley* (a). [Alderson, B.—There the rule for a new trial was obtained by the defendant, and was made absolute without any terms being offered.] This misdirection might have been made the subject of a bill of exceptions.

PARKE, B.—I think the case of *Moore v. Tuckwell* warrants us in saying that justice will be done by directing the verdict to be entered for the plaintiff on all the issues questioning the title, and for the defendant on the plea of leave and license, which there was ample evidence to prove.

ALDERSON, B.—There is a distinction between a venire de novo and a new trial. The granting a new trial, strictly speaking, is in the discretion of the Court, although the Court regulates its discretion as nearly as possible by the rules applicable to bills of exceptions. Where evidence has been improperly rejected or admitted, the Court will not grant a new trial, if with the evidence rejected a verdict given for the party offering it would be clearly against the weight of evidence, or if without the evidence received there be enough to warrant the verdict: *Doe d. Lord Teynham v. Tyler* (b), *Crease v. Barrett* (c). The case of *Moore v. Tuckwell* was in truth stronger than this. The motion is *ex debito justitiæ*, but if the *debitum justitiæ* be satisfied, that is enough. Here the utmost effect of the reception of the evidence rejected by the learned Judge would have been to alter the finding of the jury on the issues denying the title.

ROLFE, B.—Our judgment in the present case is quite consistent with the practice of discharging a rule for a new trial, unless the plaintiff consents to reduce the damages.

(a) 7 M. & W. 570. (b) 6 Bing. 564. (c) 1 C., M., & R. 919.

PLATT, B., concurred.

Rule discharged, the verdict being entered by consent for the plaintiff on all the issues except the fifth; no costs of this rule on either side.

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KYNASTON and Another, Assignees of E. T. DAVIS, a Bankrupt, v. DAVIS. June 27.

**T**ROVER by the plaintiffs, as assignees of E. T. Davis, a bankrupt. The defendant pleaded (*inter alia*), that the plaintiffs were not assignees, on which issue was joined. At the trial, before *Erle*, J., at the Summer Assizes at Bristol, 1845, it appeared in evidence that a fiat in bankruptcy issued against E. T. Davis on the 11th of June, 1844. On the opening of the fiat before the commissioner, the petitioning creditors were unable to prove their debt. Certain other creditors, to an amount sufficient to support the fiat, applied to the commissioner, within fourteen days after the fiat had been transmitted to his court, for leave to be admitted to prosecute the fiat, under the 4th section of the 5 & 6 Vict. c. 122 (a). Their application

The term "opening of the fiat," in the Bankruptcy Act, 5 & 6 Vict. c. 122, s. 4, does not mean the reading of the fiat in court, but the adduction of all the proof necessary to enable the Court to adjudge the party a bankrupt. The Court of Bankruptcy may, therefore, under that section, admit another creditor to prosecute the

fiat, after an unsuccessful attempt to prove his debt by the original petitioning creditor.

And the creditor so admitted to prosecute the fiat is not required to prove the debt of the original petitioning creditor, but the Court ought to adjudge the party a bankrupt on proof of the debt of the prosecuting creditor, and of the trading and act of bankruptcy: and such adjudication will be valid, although the original petitioning creditor's debt was in fact insufficient, and although no order for the substitution of a fresh petitioning creditor's debt be made by the Lord Chancellor, under the 6 Geo. 4, c. 16, s. 18.

(a) Enacting, "that every fiat in bankruptcy granted after the commencement of this act, shall, after the granting of such fiat, be forthwith issued, and transmitted by the Lord Chancellor's

secretary of bankrupts, in such manner and at such cost as the Lord Chancellor by any general or other order shall direct, to the Court to which such fiat shall be directed under and by virtue of

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was granted by the commissioner, and on proof of their debt, and of the trading and act of bankruptcy, Davis was adjudged a bankrupt; and the plaintiffs were afterwards duly appointed his assignees.

On this state of facts, it was contended for the defendant, that the plaintiffs had no title as assignees; for that, first, the fiat was *opened* in this case, within the meaning of the statute, by the original petitioning creditor; and secondly, that even if this were not so, the fiat was void, without proof of the petitioning creditor's debt, or the substitution by the Lord Chancellor of some other debt in its place, under the 6 Geo. 4, c. 16, s. 18. The learned Judge reserved these points, and under his direction a verdict was found for the plaintiffs, leave being reserved to the defendant to move to enter a nonsuit.

*Cockburn*, in the following term, obtained a rule nisi accordingly, against which

*Crowder* and *Taprell* shewed cause in last Hilary Term, (Feb. 6), and

*Cockburn*, *Butt*, and *Barstow* were heard in support of the rule.—The arguments are so fully stated in the judgment of the Court, that it is unnecessary to detail them. The following authorities were referred to:—*Ex parte*

the powers of any act now in force or of this act, *and shall be forthwith opened*, unless such Court shall in its discretion think fit to *postpone the opening* of such fiat: Provided always, that if such fiat shall not be *opened by the petitioning creditor* within three days after it shall have been so transmitted, or within such extended time as shall be allowed

by the said Court, such Court is hereby authorized *to open such fiat* at any time within fourteen days then next following, upon the application of any other creditor to the amount required by this act to constitute a petitioning creditor, and to adjudicate thereon, upon the proof of the debt of *such creditor*, and of the other requisites to support the fiat."

*Hayes (a), Ex parte Henderson (b), Ex parte Freeman (c), Ex parte Hall (d), Ex parte Robinson (e), Ex parte Chappell (f), Hill v. Heale (g), Muskett v. Drummond (h), Fletcher v. Manning (i), and Lord Chancellor Loughborough's Orders of the 26th of June, 1793 (k), and of the 26th of November, 1798.*

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Cur. adv. vult.

The judgment of the Court was now pronounced by

PARKE, B.—This was an action of trover by the plaintiffs, as assignees of E. T. Davis, a bankrupt. The defendant pleaded that the plaintiffs were not assignees, on which plea issue was joined.

On the trial, before my Brother *Erle*, at the last Bristol Assizes, it was proved that on the 11th of June, 1844, a fiat issued against E. T. Davis; that on proceeding to open the fiat, the petitioning creditors attempted to prove their debt, but were unable to do so; that thereupon, within fourteen days after the transmission of the fiat to the proper court, certain other persons, being creditors of E. T. Davis, to an amount sufficient to support a fiat, applied to be admitted, and were admitted, to prosecute the fiat; and on proof of their debt, and of the trading and act of bankruptcy, E. T. Davis was adjudged a bankrupt by the Court, and the plaintiffs were chosen his assignees.

My Brother *Erle* thought that these facts sufficiently made out the title of the plaintiffs as assignees, and he directed the jury to find for them accordingly, which they did; leave being reserved to the defendant to move to set

(a) 1 Gl. & J. 255.

(b) 2 Rose, 190.

(c) 1 Rose, 384.

(d) Mont. & M. 39.

(e) Id. 44.

(f) 2 Gl. & J. 131.

(g) 2 N. R. 196.

(h) 10 B. & Cr. 153.

(i) 12 M. & W. 571.

(k) 1 Rose, 385.



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aside the verdict and enter a nonsuit, in case the Court should be of opinion that the facts proved did not shew the plaintiffs to be assignees.

A rule nisi for this purpose was accordingly granted in Michaelmas Term, which came on to be argued before my Brothers *Rolfe*, *Platt*, and myself, at the sittings after last Hilary Term, and we took time to consider the case.

The title of the plaintiffs is founded on the 5 & 6 Vict. c. 122, s. 4, which enacts, that every fiat shall, when granted, be forthwith transmitted by the Lord Chancellor's secretary of bankrupts to the proper court, and shall be forthwith opened. "Provided always, that if it shall not be opened by the petitioning creditor within three days after it shall so have been transmitted, the Court may, at any time within fourteen days next following, open it, on the application of any other creditor to the requisite amount, and may adjudicate thereon, upon proof of the debt of such creditor, and of the other requisites to support such fiat." The plaintiffs, therefore, contended that they had brought themselves strictly within this provision. The fiat, they contended, was not opened by the petitioning creditor; and within fourteen days the new creditors to the requisite amount duly proved their debts, together with the trading and act of bankruptcy, on which the Court duly adjudicated E. T. Davis to be a bankrupt, and thereupon the plaintiffs were chosen assignees.

The defendant, on the other hand, argued, first, that the provision of the section in question did not apply, inasmuch as, on the facts stated, the fiat was opened by the petitioning creditor; and secondly, even if that should be decided against him, still that the fiat was void without proof of the petitioning creditor's debt, or the substitution by the Lord Chancellor of some other debt in its place, under the 6 Geo. 4, c. 16, s. 18.

The first point depends on the meaning which we are to

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give to the words "*opening the fiat*." The expression, it must be admitted, is one of doubtful import. On the circuits, the commissions are said to be *opened* as soon as they are publicly read in court; and it may be argued, by analogy, that a fiat in bankruptcy is in like manner opened as soon as it has been read in the court to which it is referred. On the other hand, there are strong grounds for holding, in the case of a fiat, that something more is meant than the mere ceremony of formally reading the document. A bankruptcy has been described as a statutory execution for the benefit of all the bankrupt's creditors. But, up to the point of adjudication, the whole matter is, or until the 5 & 6 Vict. c. 122, was, in great measure, under the sole control of the petitioning creditor; and, in the event of his letting the fiat drop, no other creditor could take advantage of it. By the adjudication, however, the whole nature of the proceeding is changed. That which was originally in the nature of private process becomes the public right of all the creditors. Then, and not till then, does the character of a statutory execution for creditors generally attach. That which had been "*close*" then becomes "*open*;" and we are all of opinion that it is in this sense that the expression "*opening the fiat*" must be understood in the statute.

Such has been undoubtedly the meaning attributed to the word "*open*" in orders made from time to time for enlarging the time for opening the commission. We were referred to several reported cases where such orders were made by Lord Eldon, particularly *Ex parte Hayes*, 1 Gl. & J. 255, in all of which the petitioning creditor had proceeded so far as to prove his debt; and yet, for want of the other proofs necessary for adjudication, the commission was not considered as having been opened; and no doubt very many similar unreported orders would be found in the old books of the registrars of bankrupts. These orders, at least, shew that the expression *opening the commission* was

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very commonly used as including all the proceedings previous to adjudication; and, if such a meaning may be given to the words, it appears to us clear that it is in that sense they are used by the legislature in the clause in question. The object of the enactment was to enable any other creditor to proceed, where the creditor who had obtained the fiat was unable or unwilling to do so, and had abandoned the fiat; an object which would obviously, in almost every case, be defeated, if we were to adopt the narrow construction contended for by the defendant. On this part of the case none of us feel any doubt, and we are agreed in opinion that, up to the point of adjudication, the fiat has not been opened, so as to exclude the operation of the proviso contained in the fourth section; and the consequence is, that in the present case the new creditors were properly let in to prove their debts and prosecute the fiat.

On the remaining part of the case, namely, what is the effect of such proof, and the subsequent adjudication and choice of assignees, we have not felt so free from doubt, as the act of Parliament is very imperfectly worded, and the intention of the legislature in this clause not clearly stated.

We now proceed to consider the more doubtful point. By the 6 Geo. 4, c. 16, s. 24, it is enacted, that on proof of the petitioning creditor's debt, the trading and the act of bankruptcy, the commissioners shall thereupon adjudge the party to be a bankrupt. The fourth section of the subsequent act, 5 & 6 Vict. c. 122, enables the commissioner, when the fiat has not been opened by the petitioning creditor, *i. e.*, where the petitioning creditor has been unable or unwilling to prove his debt and the trading and the act of bankruptcy, to proceed on the application of any other creditor to the requisite amount, and to adjudicate thereon on proof of the debt of such new creditor, *and of the other requisites* to support the fiat. Two points were

made by the defendant's counsel: first, it was said that no power to adjudicate is given by this clause, unless on proof of all the requisites to support the fiat; and this, it was said, includes the original petitioning creditor's debt; and as that debt certainly was not and could not be proved in this case, therefore there was no power to adjudicate at all. Or, secondly, if the commissioner had power to adjudicate, yet, for want of a good petitioning creditor's debt, though the fiat might be proceeded with, it would still be invalid, unless, under the 18th sect. 6 Geo. 4, c. 16, an order had been obtained from the Lord Chancellor directing the fiat to proceed, and substituting a new petitioning creditor's debt.

The first point, namely, whether it was or was not necessary to prove the original petitioning creditor's debt, depends on the meaning of the words in the 5 & 6 Vict. c. 122, s. 4, by which the commissioner is directed to proceed to adjudication, on proof of the new debt and of the other *requisites to support the fiat*. What are the *other requisites* which it is incumbent on the new creditor to prove? We are clearly of opinion, that when he has proved his own debt to be the requisite amount, the only other requisites are the trading and the act of bankruptcy. To hold that he must also prove the petitioning creditor's debt, would be to deprive the enactment of all effect whatever. An enactment that the commissioner should adjudicate, on proof by the new creditor of the petitioning creditor's debt and of the trading and act of bankruptcy, would merely be to enact that he should adjudicate on proof of precisely the same matters on which, independently of the new statute, he was bound to adjudicate by the law as it previously stood. Besides, the word "*other*" would be altogether inappropriate, if the new creditor is bound to prove all which the original creditor must have proved, including the debt of the petitioning creditor. The language, if that had been the meaning of the legis-

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lature, should have been "on proof of the debt of the new creditor, and *of the requisites*," or "*all the requisites*, to support the fiat," not of the *other* requisites. The word "*other*" clearly shews that the new debt was to be considered as one of the requisites, and that it could only be by its being taken as a substitute for the petitioning creditor's debt. This seems to us the only fair construction of the statute, independently of the consideration that, on any other hypothesis, we must suppose the legislature to have been making provision for a case which in the nature of things can scarcely occur. If the new creditor can only proceed by proving the debt of the petitioning creditor, the proviso in question, though apparently intended to benefit him, is in truth a mere illusion.

The 24th section of 6 Geo. 4, c. 16, which enables the commissioner to compel the attendance of parties whose evidence is necessary to establish the trading and act of bankruptcy, gives no means of compelling the attendance of any witness to prove the petitioning creditor's debt; and it is scarcely possible to conceive a case in which that debt can be proved by the new creditor, who has not the means of examining for the purpose either the debtor or the creditor. Even if he should by chance be able to shew that the debt was once contracted, it would obviously be impossible for him to negative all the circumstances by which it may have been afterwards discharged; such as a release, payment, or the like. On these grounds, we are clearly of opinion that the original petitioning creditor's debt is not one of *the other requisites* which it is incumbent on the new creditor to prove; but that on proof of the new debt (being a debt capable of supporting the fiat), and of the trading and act of bankruptcy, the commissioner is bound to adjudicate the debtor to be a bankrupt.

It remains to consider whether, on such an adjudication, the proceedings may go on; whether assignees may be chosen and the bankrupt's property may be administered

without more, and the fiat be valid, without regard to the original petitioning creditor's debt; or whether the adjudication has only the effect of enabling the commissioners to execute these powers *formally*, leaving the validity of the fiat to depend upon the sufficiency of the petitioning creditor's debt, which was, by the prior statute (*a*), a condition precedent to its issuing; so that, if the debt should be sufficient, the fiat would be valid; if insufficient, the fiat would be advanced to that stage at which the Chancellor might render it valid, by the exercise of the power of substitution of a new petitioning creditor's debt given to him *after adjudication*, by the 6 Geo. 4, c. 16, s. 18.

After much consideration of this question, we all agree in thinking that the proper construction of the clause is the former; and that the fiat is valid if the debt of the applying (or, as he may be properly termed, prosecuting) creditor be sufficient.

When the legislature, by the 5 & 6 Vict. c. 122, s. 4, authorised and required the commissioners, on proof of certain facts, to adjudicate a party to be a bankrupt, it must be intended, *primâ facie*, to mean that the commissioners in such case would be rightly adjudicating; and that the party adjudged bankrupt really would be what he is adjudged to be, namely, a bankrupt; and that the commissioners might lawfully exercise all the powers after adjudication, in appointing assignees, in whom the estate vests by the appointment itself (*b*).

To hold that the only consequence of the adjudication would be that the commissioners might proceed to act formally, subject to their acts being avoided if the petitioning creditor's debt should turn out not to be due, and that the fiat might be brought to that stage at which the Chancellor might interfere to render it valid, if the debt was not due, would give little or rather no effect to the clause. If

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(*a*) 6 Geo. 4, c. 16, s. 14.

(*b*) 1 & 2 Will. 4, c. 56, s. 25.

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the fiat still depended on the petitioning creditor's debt, there was no use in requiring an adjudication *on another debt*, in order to warrant the proceeding with the fiat, unless it could be subsequently supported by the exercise of the Lord Chancellor's power in substituting a new petitioning creditor's debt, under the 6 Geo. 4, c. 16, s. 18; but that clause applies only to cases where a party has by some oversight been *wrongly* adjudged to be a bankrupt, and where the petitioning creditor's debt so adjudged to be sufficient, turns out subsequently not to be so. The adjudication, therefore, would, on the latter view, be idle and useless.

We therefore think that the true construction of the clause in question is, that the adjudication on the prosecuting creditor's debt, if well founded, is to be as valid as an adjudication on a petitioning creditor's debt, if well founded, would be; and consequently that the fiat is valid, and the creditor who prosecutes a commission is in effect substituted for the creditor who petitioned for it, the former being willing to make the fiat effective after the latter has altogether abandoned it. And in this view of the case, no inquiry at all was necessary as to the sufficiency of the petitioning creditor's debt, and therefore none is required by the statute.

It is very true that the legislature has not expressly enacted that the debt should be substituted, and the fiat deemed valid, as it has done in 6 Geo. 4, which is a circumstance that has led to some doubt as to its meaning. It is also very true, that if we hold it to be the intention of the legislature to substitute a new debt, that intention has not been *clearly* carried into effect in every particular, and the prosecuting creditor placed on the same footing for all purposes as the petitioning creditor; for instance, it has not given any power to require a bond from the prosecuting creditor to prove his debt, and the other requisites, so that he may substitute himself without assuming the same

obligation as the petitioning creditor. There is no express exemption of the official assignee from liability for the failure of the substituted debt, as there is of the petitioning creditor's debt, 5 & 6 Vict. c. 122, s. 54. The case of the debt which is substituted without the permission of the Chancellor afterwards turning out to be insufficient, is not provided for by giving him the power of substituting another, if it should be found insufficient.

These defects are calculated to raise some doubt as to the intention of the legislature; but, upon the best consideration we can give the subject, we think that the true construction of the clause is, that the fiat is thereby rendered perfectly valid; and if we are right in this opinion, it is not improbable that the substituted debt would be considered as a petitioning creditor's debt, within the meaning of the clauses to which I have last referred: but we give no opinion upon that question.

Rule discharged.

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WALLER v. BLACKLOCK and Others.

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COWLING had obtained a rule, calling upon the plaintiff to shew cause why the Master should not review his taxation, by allowing the defendants the costs incurred by them at the Summer Assizes in 1844, and disallowing such costs to the plaintiff.

This was an action of trespass brought by the plaintiff against the defendants for destroying his weir. The defendants pleaded four pleas, the third of which was a bad one. The cause stood for trial at the York Summer Assizes, 1844, but was then made a remanet. On the 5th of

In trespass, the defendants pleaded four pleas, one of which was bad. The cause stood for trial at the Summer Assizes, 1844, but was then made a remanet. The defendants afterwards obtained leave to amend, by substituting another plea in the room of the bad

one, on payment of the costs of the amendment, which were paid. The cause was tried at the Spring Assizes, 1845, when the defendants had a verdict on the issue on the amended plea, and the plaintiff on the other three issues:—*Held*, that the plaintiff was entitled to the costs of the remanet.



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February, 1845, the defendants obtained a Judge's order for leave to amend the record, by withdrawing the third plea, and substituting another, on payment of costs. The plea was accordingly withdrawn, and a fresh plea pleaded, on which the plaintiff joined issue, and the costs of the amendment were paid by the defendants. The cause was tried at the Spring Assizes in 1845, when the defendants had a verdict on the third issue, and the plaintiff on all the others. The Master, on the taxation, allowed to the defendants the general costs of the cause, and to the plaintiff the costs of the remanet.

*Hoggins* shewed cause against the rule in Trinity Term (May 22), and contended that the Master was right in allowing the plaintiff the latter costs; inasmuch as, if the cause had been tried at the assizes of 1844, in the then state of the record, the plaintiff would have succeeded on the third as well as on the other issues. The defendants, by amending their plea, admitted that they could not have succeeded on it as it originally stood.

*Cowling*, contra, insisted, that as the defendants had eventually succeeded in the action, and the postponement of the trial was without any fault on their part, they were entitled to the costs of the abortive trial; and that the plaintiff, to entitle himself to the costs occasioned by the remanet, ought to have stipulated for them at the time of the amendment.

POLLOCK, C. B.—We will inquire whether there is any settled practice in the Courts on this point; if there is, we shall not disturb it; if there is not, we will endeavour to lay down some general rule. If the practice is for the defendants to pay the costs of the remanet, they must be considered to have been aware of that liability, and to have taken the amendment subject to the burthen.

Cur. adv. vult.

PARKE, B., now said—We took time to consider whether the Master was right in this case, in allowing the plaintiff the costs of the remanet. There were four pleas on the record when the parties first went down to the assizes, and the cause was then made a remanet. Afterwards the defendants applied for and obtained leave to substitute a new plea for one of the four originally pleaded, which was allowed on payment of the costs of and occasioned by the amendment. The cause went down to the next assizes, when a verdict was found for the plaintiff on all the issues raised by the pleas which were on the record at the first assizes, but he failed on the issue raised by the added plea. On taxation, Master *Walker* allowed the plaintiff the costs of the remanet from the first assizes; upon which an application was made to us to review his taxation. On consideration, we think the Master was right, although we have had some doubt upon the point. We think he was right upon this principle:—The plaintiff would have succeeded on all the issues which were upon the record at the first assizes; he underwent the delay of the postponement from those assizes; and as part of the costs of those issues he ought to have the costs of the delay, and consequently of the remanet.

This rule must therefore be discharged.

Rule discharged.

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JONES v. CARTER.

The service by lessor upon lessee of a declaration in ejectment for the demised premises, for a forfeiture, operates as a final election by the lessor to determine the term; and he cannot afterwards (although there has not been any judgment in the ejectment) sue for rent due, or covenants broken, after the service of the declaration.

**C**OVENANT on an indenture, dated the 16th of September, 1844, made between the plaintiff of the one part, and the defendant and Joseph Foster of the other part, whereby the plaintiff gave, granted, and demised to the defendant and Foster full power and authority to work, delve, dig, and open, all the mines, veins, seams, and beds of lead ore, copper ore, sulphate of barytes, mines, minerals, and mineral substances, which were or should be thereafter found, gained, dug, or opened within, under, or upon a certain common or waste land belonging to her Majesty, and then in lease to the plaintiff, situate in the parish of Llysfaen, in the county of Carnarvon; with full powers for the purpose of getting and taking the minerals, erecting machinery, &c. &c.; to hold to the defendant and Foster, their executors, &c., from the 29th of September then instant, for the term of fourteen years, subject to a yearly rent of £50, payable half-yearly in advance, in the nature of a forehand rent, on the 25th of March and the 29th of September in each year, the first payment to be made on the 29th day of September then instant; and subject also to the payment of a certain royalty on the ores and minerals raised and gotten. And the defendant thereby covenanted with the plaintiff, his executors, &c., well and truly to pay and render, or cause to be paid or rendered, to the plaintiff, his executors, &c., the rent and royalty thereinbefore reserved and made payable, at the days and times and according to the true intent and meaning of the said indenture, without any deduction or abatement whatever; and also to pay and discharge all taxes, &c., charged or assessed upon the demised premises. There were also covenants that the defendant and Foster, their executors, &c., would, during the continuance of the demise, with six men at the least, search for lead and other ores and minerals in proper and likely places, &c., and would fairly and effec-

tually work and carry on all the mines and works with six able and experienced miners at the least; that they would not cease or discontinue such work, with the aforesaid number of men, for the space of one month in any one year, unless prevented by unavoidable impediments: and other covenants, providing for the dressing and making merchantable of the ores gotten as soon as might be after they were gotten, for the weighing or measuring them within a certain time, for the keeping and regularly casting up fair and legible books of account of all ores and minerals gotten and sold, and producing the same for inspection, &c., upon notice, to the lessor and his agents; for the general repair of the demised premises; for the fencing off and securely inclosing open pits, &c.; for effectually filling up and levelling such pits, &c., as should from time to time become useless; for preventing unnecessary or extraordinary damage to the lands through or under which the mines, &c., should be carried on; and for the non-commission of any wilful or voluntary waste.—The declaration then alleged as a breach of the first covenant (for payment of the rent), that after the making of the indenture, and during the term, to wit, on the 25th of March, 1845, a large sum of money, to wit, £50 of the rent aforesaid, to wit, the rent for a year of the said term, became due and still was in arrear and unpaid to the plaintiff. Breaches were also assigned of all the other covenants in the indenture.

The defendant pleaded, as to the breach of covenant first assigned, that there was not, on the said 25th day of March, 1845, or at any time since, the said sum of £50 of the said rent, or any part thereof, due and in arrear from the defendant and Foster to the plaintiff, in manner and form, &c.: on which issue was joined.—There were also pleas of performance as to the other breaches, and issues joined thereon.

At the trial, before *Williams, J.*, at the last assizes for the county of Carnarvon, the plaintiff clearly proved

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breaches, in the years 1844 and 1845, of several of the covenants set forth in the declaration; as to others also, the proof of performance of which lay on the defendant, no evidence was given on his part. With respect to the rent, payment was proved of all that was due on the 25th of March, 1845: and it appeared that, on the 19th of May, 1845, a declaration in ejectment for the recovery of the demised premises (brought under a proviso in the lease, that for any breach of covenant it should determine and be utterly void, and the lessor should be at liberty to re-enter), upon the several demises of the plaintiff and William Lloyd Roberts (a mortgagee), was served on the defendant and Foster, with notice to appear in the following Trinity Term. There was no distinct evidence when the plea and consent rule were delivered; but it was proved that on the 3rd of December, 1845, the defendants obtained a Judge's order, giving them liberty to withdraw their plea; since which time no further proceedings had been taken in that action. The present action of covenant was commenced in January, 1846. It appeared that the defendants had not done anything upon the demised premises since July, 1845; but it was not shewn that any possession of them had been taken by the plaintiff. It was thereupon contended for the defendant, that by the service of the declaration in ejectment, and the subsequent proceedings in that action, the plaintiff had elected to consider the term as having then determined, and to treat the defendant and Foster as trespassers; and that he could not, therefore, recover in this action for the rent which would otherwise have become due on the 29th of September, 1845. The learned Judge overruled the objection, and told the jury that the plaintiff was entitled, on the first issue, to recover the sum of £25, for half a year's rent due on the 29th of September, 1845, and also directed them that he was entitled to a verdict on several of the other breaches (on which nominal damages only were claimed). The jury, however,

found a general verdict for the defendant, saying they were of opinion that there was no rent due, and that there were no breaches of covenant.

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In Easter Term, *Jervis* obtained a rule nisi for a new trial, on the ground of the verdict being contrary to the evidence, and to the direction of the learned Judge.

*W. Yardley* and *Unthank* shewed cause on a former day in these sittings (June 26).—The verdict of the jury, it must be admitted, was contrary to the direction of the learned Judge on several of the issues. But with respect to the first breach, as to the rent, upon which alone the plaintiff claimed substantial damages, the proceedings in the action of ejectment were an answer to that claim. The plaintiff, when he sued the lessees in ejectment as for a forfeiture of their term, elected thereby to put an end to the term, and could not afterwards treat it as a subsisting term, and the rent as a subsisting rent. It is true there was no *judgment* in the ejectment; the plea having been withdrawn, the defendant has no means of compelling the lessors of the plaintiff to proceed to judgment. [*Platt*, B.—If they choose to proceed to judgment now, they may have an action of trespass for the mesne profits from the day of the demise.] Yes, and so they would be recovering this rent twice over. *Birch v. Wright* (a) is an authority for the defendant. It was there held, that an action for use and occupation might be maintained by the grantee of an annuity, after a recovery in ejectment against a tenant from year to year of the lands out of which the annuity issued, for all rent in his hands at the time of notice by the grantee, and down to the day of the demise in the ejectment, *but not afterwards*. *Ashhurst*, J., there says—"From the 6th of April of 1785 [the day of the

(a) 1 T. R. 378.

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demise] to the time of recovering in the action of ejectment, the plaintiff is precluded from recovering in this form of action; for that would be blowing both hot and cold at the same time, by treating the possession of the defendant as that of a trespasser, and that of a lawful tenant, during the same period." Littleton says (sect. 219)—"If a man grant by his deed his rent-charge to another, and the rent is behind, the grantee may choose whether he will sue a writ of annuity for this against the grantor, or distreine for the rent behind, and the distress detain until he be paid. *But he cannot do or have both together, &c.* For if he recovers by a writ of annuity, the land is discharged of the distress," &c. Lord Coke, commenting on these words, "But he cannot do or have both together," says (Co. Litt. 145. a)—"For there he should recover one thing twice, which should be a double charge to the grantor." In *Bridges v. Smyth* (a), it was held that a landlord, having treated an occupier of his land as a trespasser, by serving him with an ejectment, could not afterwards distrain on him for rent, although the ejectment was directed against the claim of a third person, who came in and defended as tenant, and the occupier was aware of that circumstance, and was never turned out of possession. That case is, therefore, stronger than the present.

*Welsby* (*Jervis* with him) contra.—No doubt, although the lease says that it is to determine and be void for any breach of covenant, that is to be construed to mean that it is thereupon voidable at the option of the lessor. But there is no conclusive election to treat the term as determined and void, until judgment recovered in the action of ejectment. The mere service of the declaration has no such effect. Might not the plaintiff, notwithstanding that, have waived the forfeiture by subsequent receipt of rent? It is said

(a) 5 Bing. 410.

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that he may still proceed to judgment in the ejectment, and have his remedy in trespass for the mesne profits; but if he did, the recovery of the rent in this action would be pleadable in bar, pro tanto, to the action for the mesne profits. The authority cited from Co. Litt. itself shews that there is no conclusive exercise of this option until judgment. Lord *Coke* there says—"If I grant to another for life an annuity or a robe at the feast of Easter, and both are behind, the grantee ought to bring his writ of annuity in the disjunctive; for if he bring his writ of annuity for the one only, *and recover, that judgment* shall determine his election for ever; for he shall never have a writ of annuity afterwards, but a scire facias upon the said judgment. Which reason Fitzherbert, in his *Natura Brevium*, not observing, held an opinion to the contrary. But if I contract with you to pay you twenty shillings or a robe at the feast of Easter, after the feast you may bring an action of debt for the one as for the other." [*Alderson*, B.—Lord *Coke*, and Fitzherbert in the passage there referred to (*a*), are distinguishing between the cases when the thing granted "is of things annual, and are to have continuance,"—in which the election remains to the grantor, as well after the day as before,—and "when the things are to be performed unicâ voce," as in the case of the contract to pay twenty shillings or a robe at Easter.] In *Birch v. Wright*, the grantee of the annuity had recovered judgment in the ejectment. And *Buller*, J., there says—"In the present case the plaintiff has not waived the tort. He has brought his ejectment, *and obtained judgment* on it, which is insisting on the tort, and he cannot be permitted to blow both hot and cold at the same time." And again—"The ejectment is the suit in which the defendant is considered as a trespasser; and unless the *judgment* in ejectment be laid out of the case, the tort is not waived. The defendant stands convicted on

(*a*) Fitz. N. B., 152 G.



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(in which of course the *entry* was admitted), the receipt of rent after the bringing of that ejectment was too late, and the lease was not rendered valid. We think the same consequence follows from an entry admitted by the consent-rule; but even supposing no consent-rule to have been entered into, we think that the bringing of an ejectment for a forfeiture, and serving it on the lessee in possession, must be considered as the exercise of the lessor's option to determine the lease; and the option must be exercised once for all. Without inquiring whether an ejectment be a real action, the bringing of which and the counting in which would, according to the authority of Lord *Coke*, be a determination of an election between two remedies, it seems to us that so distinct and unequivocal an act must, independently of any technical reason, be a final determination of the landlord's option; for after such an act, by which the lessor treats the lessee as a trespasser, the lessee would know that he was no longer to consider himself as holding under the lease, and bound to perform the covenants contained in it; and it would be unjust to permit the landlord again to change his mind, and hold the tenant responsible for the breach of duty, after that time.

We are all, therefore, of opinion that the lease was determined in May, 1845, and consequently the defendant was not liable to pay the subsequent rent, or damages for any subsequent breach of covenant. There is no reason, therefore, for a new trial as to the issue on the rent being in arrear.

With respect to the remainder, the verdict was clearly wrong, and there must be a new trial, unless the defendant will consent that a verdict be entered for the plaintiff with nominal damages, subject to the same discretion as Mr. Justice *Williams* would have had at the trial, to certify to deprive the plaintiff of costs.

Rule accordingly.

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## COOKE v. TURNER.

*June 26.*

**THIS** was a case sent by the Vice-Chancellor of England for the opinion of this Court.

The case stated, in substance, that Sir Gregory Page Turner was duly found a lunatic in the year 1823, under a commission of lunacy. The inquisition and the finding thereon were traversed, but the lunacy was established by the verdict of a jury in 1826, and that the commission was never superseded. In the year 1841, Sir G. O. P. Turner made a will, duly executed so as to pass real estate, whereby he gave certain considerable interests in his real estate to his daughter, Mrs. Fryer, and, subject thereto, gave his property to her children, and in default of issue to his collateral relations; and in the will was contained the following clause:—"And my will further is, that if my said daughter, or her husband, or any person or persons in her, his, their, or any or either of their behalf, shall dispute this my will, or my competency to make the same, or if my said daughter and her husband, or either of them, shall refuse to confirm this my will, as far as he or she lawfully can, when required by my executors or either of them so to do, or if they or either of them, or any person or persons in the name or on behalf of them or either of them, shall lodge any caveat against proving the same, and if my said daughter and husband, or either of them, shall refuse or neglect to withdraw or cause to be withdrawn such caveat, fourteen days after request made by my executors or either of them to that effect; or if any proceedings whatsoever shall at any time be had or taken by any person or persons whomsoever, by any possible result of which any estate or interest could be in any way attainable by my said daughter, or her husband, or any person or persons in her right, of larger extent or value than is intended for her by this my will, and such proceeding shall not be formally disavowed, stayed, or resisted by

A condition, in a will of real estate, that if the devisee shall dispute the will, or the testator's competency to make it, or shall refuse, when required by the executors, to confirm it, the disposition in favour of such devisee shall be revoked,—is valid in law.

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my said daughter and her husband, to the full extent of their, her, or his ability to do so, then I revoke the use and disposition hereinbefore contained, for the raising and payment, during the life of my said daughter, in manner hereinbefore mentioned, of the aforesaid yearly sum of £2000, and also the use and disposition hereinbefore contained in her favour, in the event hereinbefore mentioned, of the rents and issues and profits of my estate hereinbefore devised, and also the liberty of residing in my said mansion-house, and all other benefits hereby given to or in trust for my said daughter, or derivable by her under this my will, and in lieu thereof I devise to the use of my said trustees, by and out of the net rents, issues, and profits of my said real estate, thenceforth, the yearly sum of £300 only, during the natural life of my said daughter, by equal half-yearly payments, the said yearly sum to be paid into the proper hands of my said daughter, and not into the hands of any other person or persons whomsoever."

Sir G. O. P. Turner died in 1843, without having revoked or altered his will, leaving Mrs. Fryer his only child and heiress at law; and she had no issue. Since the death of Sir G. O. P. Turner, Mrs. Fryer and her husband have disputed her father's will, and his competency to dispose of his property, and have refused to do any act to confirm the will.

The question submitted for the opinion of the Court was, whether or not Mrs. Fryer had thereby forfeited the devises in her favour contained in the will.

The case was argued at the sittings after last Hilary Term (Feb. 13), by

*Peacock* for the plaintiff.—The condition annexed to this devise, that the devisee shall do nothing to contest the will, or the testator's competency to make it, is perfectly valid. There is no authority whatever to shew that it is not. In *Cleaver v. Spurling* (a), a testator, a freeman of London,

(a) 2 P. Wms. 526.

gave by his will £35 to his daughter, provided that if she refused to give a release, or put the executors to any trouble, the legacy should go over to her sister's children. The daughter claimed her orphanage part, and did not claim the £35 legacy; and this was held to be a forfeiture, and to vest the legacy in the devisee over, the condition being good in law. The condition in the present case does not differ in principle from that. So, in *Simpson v. Vickers* (a), where there was a conditional limitation over, if the first devisee should refuse or neglect to comply with the condition, that within six months after the testatrix's death he should release all demands upon her as executrix of A.; a failure of this condition, arising from the act of the first devisee, as heir at law, contesting the will, was held to vest the estate in the devisee over. No suggestion was there made of any objection to such a conditional limitation on the ground of public policy. An anonymous case, 2 Mod. 7, is as follows:—"A man devises land to A., his heir at law, and devises other land to B. in fee, and saith, 'If A. molest B. by suit or otherwise, he shall lose what is devised to him, and it shall go to B.' The devisor dies: A. enters into the land devised to B., and claims it. The Court were of opinion, that this entry and claim is a sufficient breach to entitle B. to the land of A." So, a condition that the devisee shall lose the estate if he marry without consent of a particular person, is good and valid: *Williams v. Fry* (b), *Fry v. Porter* (c), *Hervey v. Aston* (d). Unless the intention of the testator be clearly contrary to the policy of the law, it is the duty of the Courts to carry it out. In *Boughton v. Boughton* (e), it was expressly held, that a legacy to an heir, upon the express condition that he did not litigate or dispute the will, would put him to an

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(a) 14 Ves. 341.

(b) 1 Mod. 86.

(c) 1 Cases in Chanc. 138.

(d) Willes, 83; Comyns, 726  
1 Atk. 371.

(e) 2 Ves. sen. 12.

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election between the legacy and the lands devised away, the will not being executed so as to pass real estates. In *Acherley v. Vernon* (a), a rent-charge was given to the testator's sister, in lieu and satisfaction of all claim she might have on his real or personal estate, and upon condition that she released all right and claim thereto to his executors and trustees; and the sister having lived several years without executing any release, it was held that she was not entitled to the arrears of the rent-charge. And the Court said, the release was a condition precedent; but if it were only a condition subsequent, it ought to have been performed in a reasonable time, or at all events during her life. In *Webb v. Webb* (b), a father gave his son £40, upon condition that he did not disturb the trustees; and on the trustees' applying for an execution of the trust, the son was decreed either to join them in a sale of the trust estates, or to forfeit his legacy. There is nothing in the present condition more illegal than in those which existed in the cases cited. What is there contrary to public policy that a man should restrain his child from disputing his competency, by saying that if she does he will not give her his estate? [*Rolfe*, B.—Suppose, instead of imposing a negative duty, the neglect of which should divest the estate, he had imposed an affirmative duty, on condition of the performance of which the estate should vest; as that if she should in six months execute a deed confirming all the uses of the will, she should take:—why is that invalid? and this is the same in substance; I see no difference in this respect between conditions precedent and subsequent.]

*Martin*, for the defendant.—This is a void condition. There is a clear distinction between conditions precedent and subsequent, from the earliest authorities. The question here is, whether a condition subsequent, which has a

(a) Willes, 153.

(b) 1 P. Wms. 136.

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direct tendency to induce parties to abstain from contesting the will of insane persons,—a condition which, if applied to the case of *forgery*, has a direct tendency to establish forged wills—is legal and valid. In the words of Shepard's Touchstone, it is “against the liberty of the law,” and therefore void. It is the policy of the law to guard against the establishment of wills made by persons who have been found lunatic according to the regular forms of law. The finding of the jury on the inquisition of lunacy is evidence—not conclusive in law, but so in practice—of the incompetency of the party, in a court of law. Can, then, an estate given to the heir at law be divested from him, if he inquire into the incompetency of such a person? The law is the same as to conditional limitations, such as this, as it is with respect to conditions at common law. The condition against marriage is only one instance of illegal conditions, of which there are many. The Statute of Wills itself, 34 & 35 H. 8, c. 5, s. 14, declares that wills made by persons of non-sane memory shall not be good or effectual in the law. It is, therefore, contrary to the policy of that law to impose a prohibition upon the heir at law, of having the fact of the testator's sanity ascertained. It cannot be a good condition, which deprives the heir at law of the benefit intended for him, if he presumes to institute an inquiry which the law supposes right. No other person has authority to take care that the law is not transgressed in this respect. There is no public officer who can do it on the part of the public. The cases cited on the other side do not bear out the argument for the plaintiff. *Cleaver v. Spurling* was a mere case of election; and the doctrine of election has nothing to do with this case. There is nothing illegal in the condition imposed in the case of *Simpson v. Vickers*, or in the anonymous case in 2 Mod. 7. *Williams v. Fry*, *Fry v. Porter*, *Hervey v. Aston*, and *Acherley v. Vernon*, were cases of conditions precedent. *Boughton v. Boughton* is put by Lord Hardwicke entirely as a

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case of election, it being assumed for that purpose that the deviser was competent to make a will. *Webb v. Webb* was also a case of election. The text writers represent a condition of this nature as being in general considered in *terrorem* merely. Mr. *Williams* says (a)—“A condition that the legatee shall not dispute the will is, in general, considered in *terrorem* merely, and will not operate a forfeiture by reason of the legatee’s having disputed the legacy or effect of the will. But where the legacy is given over to another person in case of a breach of such condition, then if the legatee controvert the will, his interest will cease and vest in the other legatee”—for which he cites *Cleaver v. Spurling*. “If indeed the legacy, instead of being given to a stranger, is limited over to the executors in the event of a condition being broken, such condition is still merely regarded as in *terrorem*, and not obligatory. Yet if the testator direct the legacy to fall into *the residue* upon a breach of the condition, and dispose of that fund, the residuary legatee will be a particular legatee of the individual legacy, and as such will be entitled to it, if the condition is broken.” Mr. *Jarman* (b) and Mr. *Powell* (c) state the law to the same effect. But in no case has this doctrine yet been applied to a devise of land. *Cage v. Russel* (d) is an authority to shew that where, upon breach of such a condition, the legacy is limited over to the executors, the condition is still regarded merely as in *terrorem*; and that was the first case on the subject. In *Powell v. Morgan* (e), and *Morris v. Burroughs* (f), again, such a condition is treated as merely being in *terrorem*, and not obligatory. *Loyd v. Spillett* (g) is also a strong authority in favour of the same view; and there the legacy was, as here, to sink, on breach of the condition, into the general fund, for the benefit of

(a) *Williams on Executors*,  
 3rd edit. 1009.

(b) *Jarman on Wills*, 836.

(c) *Powell on Devises*, 295.

(d) 2 Ventr. 352.

(e) 2 Vern. 90.

(f) 1 Atk. 404.

(g) 3 P. Wms. 344.

the party entitled to the inheritance. The only other authority relating to the subject is that of *Lloyd v. Branton* (a), where the condition, which was against marrying without consent, was held to take effect, there being a gift over. These are all the authorities on the point, and they appear to leave the question open for decision. Then the matter to be decided is, whether this is not an illegal and void condition, being against the policy and liberty of the law. It is in some sense the *duty* of an heir at law to prevent the will of a non-sane ancestor from having effect. If this condition be upheld, there will be no will of an incompetent person without such a clause, and the forgery of wills will be greatly increased. The investigation can do no harm: if the testator was competent, the will will be established; if he was not, it will be set aside, which is the policy of the law. And it differs from the case of a condition precedent, in that here the estate is for this cause to be taken out of the heir at law, *after* it has already vested in him.

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*Peacock*, in reply.—All the cases in equity on this subject, relating to personal legacies, turn on the point whether there was a gift over on breach of the condition. If there is, the condition operates, though it may have been intended in *terrorem* only. All the cases cited, where such a condition has not operated, are where there has been no limitation over. Then is it against the policy of the law? If it be, so also would be a condition precluding the heir at law from setting up the incompetency of the testator to make a marriage settlement, whereby he provided for his wife and younger children. And in deciding whether such condition is void as being against public policy, the Court will look at the question as applicable to all wills, not with respect only to the reasonableness or unreasonableness of the pro-

(a) 3 Meriv. 118.



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visions of this particular will; nor will they take into consideration the evidence to shew this particular testator to have been, in fact, non compos. [*Parke, B.*—No; the case cannot turn on the quantum of evidence, or *probabilis causa*; we must decide it on the assumption that he was in fact sane.] Assuming that, what is there against public policy in his preventing all his acts of indiscretion from being raked up, in order to give his heir at law a greater estate? And if this may be done lawfully by way of condition precedent, why not equally by condition subsequent?

Cur. adv. vult.

The judgment of the Court was now delivered by

ROLFE, B.—This was a case sent by the Vice-Chancellor of England for the opinion of this Court, on the effect of a proviso contained in the will of the late Sir Gregory Page Turner. [His Lordship stated the facts of the case, and continued:] There is no doubt that, by disputing the will, and refusing to confirm it when required so to do, the devisee, Mrs. Fryer, has brought herself both in letter and spirit within the proviso, by which her interest is made to determine; so that her interest is clearly forfeited, unless the proviso itself is void; and accordingly, the argument on her behalf was, that the proviso is bad, as being contrary to the policy of the law. The ground on which the argument against the proviso was made to rest was, that every heir at law ought to be left at liberty to contest the validity of his ancestor's will, and that any restraint artificially introduced might tend to set up the wills of insane persons, and would, in the language of the *Touchstone*, (132), be "against the liberty of the law." We cannot, however, adopt this reasoning. There appears no more reason why a person may not be restrained by a condition from disputing sanity, than from disputing any other doubt-

ful question of fact or law, on which the title of a devisee or grantee may depend. *In Stapilton v. Stapilton (a)*, a father, being entitled to estates for 99 years, if he should so long live, with remainder after his decease to his first and other sons successively in tail, and having two sons, concurred with them in an arrangement for cutting off the entail, and settling the estates in equal moieties on his two sons. While the matter was in progress, and before its final completion, the eldest son died, and his infant child having filed a bill to compel a completion of the arrangement, the defendant, the second son, by his answer objected, that his eldest brother was in fact a bastard, and so he insisted that the proposed arrangement was not binding; but Lord *Hardwicke* held the agreement good, and compelled the second son to concur in all acts necessary for vesting a moiety of the property in the plaintiff. Now a proviso good by way of contract must also be valid by way of condition; and therefore it seems to us to follow, as a necessary corollary from that case, that if A., having succeeded to real property as heir of his father, should devise it partly to a stranger, and partly to B., his next brother, subject, as to the gift of B., to a proviso defeating his estate in case he should dispute his (A.'s) legitimacy, such a proviso would be perfectly good; and yet such a condition would, if we were to adopt the defendant's reasoning in this case, be void, as infringing the liberty of the law. It would prevent or tend to prevent B. from contesting A.'s legitimacy; and it is surely as much against the policy of the law, that an heir should be disinherited by an illegitimate child, as by a party claiming under the will of a non compos. The same principle applies to the case of a proviso restraining a devisee from litigating some doubtful question of law. The truth is, that in none of these cases is there any policy of the law on the one side or the other. The conditions said to be void, as trenching on the liberty of the law, are

(a) 1 Atk. 2.

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those which restrain a party from doing some act which it is supposed the state has or may have an interest to have done. The state, from obvious causes, is interested that its subjects should marry; and therefore it will not in general allow parties, by contract or by condition in a will, to make the continuance of an estate depend on the owner not doing that which it is or may be the interest of the state that he should do. So, the state is interested in having its subjects embarked in trade or agriculture, and therefore will not allow a condition defeating an estate, in case its owner should engage in commerce, or should plough his arable land, or the like. The principle on which such conditions are void, is analogous to that on which conditions defeating an estate, unless the owner commits a crime, are void. In the latter case, the condition has a tendency to the violation of a positive duty; in the former, to prevent the performance of what partakes of the character of a duty of imperfect obligation. But in the case of a condition such as that before us, the state has no interest whatever apart from the interest of the parties themselves. There is no duty on the part of an heir, whether of perfect or imperfect obligation, to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or the devisee; and we conceive, therefore, that the law leaves the parties to make just what contracts and what arrangements they may think expedient, as to the raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of property to one claimant rather than another. The question, whether this proviso is a proviso void as being contrary to the policy of the law, may be well tested by considering how the case would have stood, if, instead of a condition subsequent, it had been made, as in substance it might have been made, a condition precedent. Suppose the testator had said, in case my daughter and her husband shall execute all deeds necessary for settling my estates in manner hereinafter mentioned,

then I give her, &c., surely there would be no doubt of the validity of such a condition, as a condition precedent; and if so, it must be good as a condition subsequent: for where a condition is bad on grounds of public policy, it must obviously be bad whether it be precedent or subsequent. The law will no more allow anything contrary to public policy to be made the means whereby a party shall entitle himself to an estate, than whereby he shall be made to lose that of which he is already in possession.

On these grounds, thinking there is no question of public policy involved, and considering that the law leaves it to the parties interested in property, and to them alone, to decide for themselves what questions of law or of fact they shall insist on or abandon, we have come to the conclusion that this proviso is good, and we shall certify accordingly to the Lord Chancellor.

Certificate accordingly.

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GRANT v. MADDOX (a).

**ASSUMPSIT.** The first count of the declaration stated, that the plaintiff, before and at the time of the making of the promises, &c., followed and exercised, and still follows and exercises, the business and profession of an operative performer, public singer, and actress, and the defendant then was, and still is, the lessee and manager of a certain theatre or play-house, called the Princess's Theatre; and thereupon, to wit, on &c., in consideration that the plaintiff, at

By a written contract, the plaintiff agreed to perform at the defendant's theatre, and the defendant agreed to engage her for *three years*, and pay her a salary of £5, £6, and £7 per week in those years

respectively:—*Held*, that parol evidence was admissible to shew that, according to the uniform usage of the theatrical profession, the plaintiff was to be paid only during the *theatrical season*—i. e. during the time when the theatre was open for performance—in each of those years.

Where a contract is contained in letters, it is sufficient if one of the letters bear a 1*l.* 15*s.* stamp, although, on the part of one of the contracting parties, the letters are written and signed by an agent.

(a) Decided in Trinity Term (*May 25*).

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the request of the defendant, would enter into an engagement with the defendant to act and perform at the said theatre for the space of three years then next following, upon the following amongst other terms [stating them]; he the defendant then promised the plaintiff that he would pay to the plaintiff £5 for each week of the first of the said three years, £6 for each week of the second of the said three years, and £7 for each week of the third of the said three years. The declaration then averred mutual promises, and that the plaintiff entered upon her said engagement, and performed such parts as she was bound thereby to perform, &c.; and although, at the time of the commencement of this suit, the first year of the said engagement, and part of the second year, to wit, nine months and three weeks thereof, had elapsed, yet the defendant has disregarded his promise in this, to wit, that he has refused and still refuses to pay to the plaintiff her said salary for the space of twelve weeks of the said first year, amounting, to wit, to the sum of £60, and has also refused to pay to the plaintiff her said salary for the space of nine weeks of the said part of the said second year, amounting, to wit, to the sum of £54, and the said arrears of salary still remain and are wholly unpaid to the plaintiff. There were also counts for work and labour, and on an account stated.

Pleas: first, non assumpsit; secondly, as to so much of the first count as relates to the non-payment of the plaintiff's salary for eight weeks of the said nine weeks of the said part of the said second year in the first count mentioned, that at the time of the commencement of this suit the said space of eight weeks had not, nor had any part thereof, elapsed, in manner and form &c.; thirdly, to the first count, except as to £6, parcel of the sum of £54 therein mentioned, payment before action brought; fourthly, as to the £6, payment into Court, which the plaintiff accepted and took out of Court in satisfaction of that amount.

At the trial, before *Pollock*, C. B., at the sittings in Middlesex after last Hilary Term, the plaintiff, in order to prove the contract stated in the declaration, put in evidence a correspondence between Mr. James Grant, the plaintiff's father, and the defendant, of which the material part was contained in the following letters (a):—

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“ 45, Duke-street, Sheffield-moor, Sheffield,  
19th Jan. 1844.

“ My dear Sir,—I received your letter of the 17th only this morning, and though the delay of your reply was but a day, yet it has created much difficulty in the way of making arrangements, so as to meet anything like your wishes, as to the time you wish Miss Grant to be in Lon-

(a) A former action had been brought by the plaintiff against the defendant, to recover the sum of £24, for four weeks' salary, ending in December 1845. The declaration set forth the special contract, as in the present case; to which the defendant pleaded non assumpsit only. This action was tried at the Middlesex sittings in Hilary Term 1846, before *Alderson*, B. The plaintiff, in order to prove the contract, tendered in evidence the above and earlier letters between the plaintiff's father and the defendant. One of them bore a 1*l.* 15*s.* stamp. It was objected for the defendant, that each of them ought to have been impressed with a £1 agreement stamp. The learned judge overruled the objection, but gave leave to move to enter a nonsuit upon it, and the plaintiff obtained a verdict for the amount claimed. A motion was made

accordingly (*Jan.* 26, 1846), and it was argued that the proviso in the Stamp Act, 55 Geo. 3, c. 184, sched. part 1, tit. “Agreement,” which provides that “where divers letters shall be offered in evidence to prove any agreement *between the parties who shall have written* such letters, it shall be sufficient if any one of such letters shall be stamped with a duty of 1*l.* 15*s.*,” &c., did not apply, because here the letters forming the contract were not written by the plaintiff herself, but by her father. *Hyde v. Johnson*, 2 Bing. N. C. 776, and *Hubert v. Moreau*, 2 C. & P. 528, were cited. The Court, (*Pollock*, C. B., *Alderson*, B., and *Platt*, B.), however, were clear that the proviso applied to a writing by the parties themselves, or by their agents; if it were not so, every partner in a firm must concur in the writing of every letter;—and the rule was refused.

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don. Taking both your letters together, the engagement which you propose would be, as to time, *three years*, at a salary of five, six, and seven pounds *per week in those years respectively*, being an advance of £1 per week on each of the two last." [The letter went on to state particulars as to the characters the plaintiff was to perform, the dresses she was to provide, &c. It then proceeded:]—"She sees no objection, and has none in so concluding the engagement with you, provided she is not required to open sooner than Saturday, the 3rd of February, and that she receives your answer to that effect without the loss of a post, as the arrangement of her benefit here will depend on that; and even so, she will have to make great sacrifices, you having already lost a day in a matter apparently so urgent has been a great drawback; and if another day should be so lost, it may produce difficulties that may not be so easily obviated as even at present. Miss Grant writes by this post to Mr. Wood, directed to the theatre. Please call on him at once, should you find such necessary to enable you to write your answer to me to-morrow, so that I may receive it on Saturday.

"I remain your very obedient servant,

"JAMES GRANT."

"Princess's Theatre, Jan. 20, 1844.

"My dear Sir,—In answer to your letter of yesterday, I accept Miss Grant's services on the terms mentioned, and I expect Miss Grant to be here and ready to perform on Monday, the 5th of February. \* \* \* \*

"Yours truly,

"J. M. MADDOX."

The plaintiff's counsel contended, that the contract established by these letters was a contract for the plaintiff to perform, if required, and to receive a salary for, every week of the whole of each of the three years. On the part of

the defendant, evidence was tendered to shew that, according to the understanding and custom of the theatrical profession, under an engagement to perform for one or more *years*, actors were never paid during the time of vacation, when the theatre was closed, but only during what was called the theatrical *season*; according to which view of the case, the special contract alleged in the declaration was not proved. The reception of this evidence was objected to by the plaintiff's counsel, on the ground that it went to explain and vary the unambiguous written contract between the parties. The Lord Chief Baron, however, received the evidence, and in summing up, told the jury, that the question for them to decide was, whether the contract was to perform and be paid throughout the three years, or only during the theatrical season in three years, and that in the latter case the defendant was entitled to a verdict. The jury found their verdict for the defendant.

In last Easter Term, *Martin* obtained a rule for a new trial, on the ground that the above evidence had been improperly received.

*Montagu Chambers* (with whom was *Thomas*) now shewed cause.—The evidence objected to was clearly receivable, and being received, proved a contract different from that set forth in the declaration. This was a *theatrical* contract, made with reference to the known usages of the theatrical profession, and to be construed, therefore, by evidence of those usages. Many authorities have clearly established, that whenever a written contract is made with reference to the custom of a particular district, or the usage of a particular trade or profession, evidence of that usage or custom is receivable, not to *vary* or *contradict* the written contract, but to shew what the contract is,—the usage or custom being a part of it. Thus, commercial men were allowed, by Lord *Kenyon*, to be called to shew that when, in a merchant's letter, it was said that a ship

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would sail from a foreign port "in the month of October," it was generally understood that she would not sail before the 25th of that month: *Chaurand v. Angerstein* (a). So, a clause in a bill of lading, that the cargo shall be taken up in a certain number of days, or to pay demurrage, may be shewn by parol evidence to mean *working* days, not running days: *Cockran v. Retberg* (b). So, where, in a lease of a rabbit-warren, the lessee covenanted to have ten thousand rabbits on the warren, the lessor paying a certain sum per thousand for them, parol evidence was held admissible to shew that, by the custom of the country where the lease was made, a *thousand* rabbits meant *twelve hundred*: *Smith v. Wilson* (c). In *Hutton v. Warren* (d), Parke, B., thus states the principle on which such evidence is admitted:—"It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages." But the case of *Regina v. The Inhabitants of Stoke-upon-Trent* (e) is expressly in point. There a workman was hired for a year to serve in the trade of china manufacturers, by a written agreement, which was altogether silent as to any period of absence to be allowed to the workman; and it was held that parol evidence was admissible to shew that it was the custom of that trade for the workmen to take certain holidays, and

(a) Peake's N. P. C. 43.

(b) 3 Esp. 121.

(c) 3 B. & Ald. 728.

(d) 1 M. & W. 475.

(e) 5 Q. B. 303.

to absent themselves on such occasions from their work without the master's permission.—The Court then called on

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*Martin and Peacock*, in support of the rule.—The evidence objected to was not receivable, and there was, therefore, no variance. The true rule is, that if parties enter into a written contract,—especially where it must be in writing, or else is void,—the writing alone speaks; with two exceptions: first (which indeed is hardly an exception), where the language used in the contract has by usage acquired a particular known meaning—e. g. a “Welsh rabbit;” secondly, the exception introduced by the case of *Wiglesworth v. Dallison* (a), by which the custom of the country as to agricultural matters is imported into agricultural leases, where it is not directly excluded by the terms of them. But this case does not fall within either of those exceptions. There is no ambiguity in this contract; but if there is, the result is not to let in parol evidence to explain it, but to render it void. [*Alderson*, B.—Where the meaning of the *words* used is clear, but the *contract* is ambiguous, it is void; but you may explain the meaning of the *words used* by evidence.] There is nothing unreasonable in the plaintiff's being paid all the year round. Why might not the parties contract so as to give her a livelihood for the whole year? If they intended to restrain the agreement to what is called the theatrical season, they should have expressly so stipulated, as in *Kemble v. Farren* (b), where the agreement was to pay the defendant a certain sum “for every night on which the theatre should be open during the ensuing four seasons.” Suppose the defendant chose to open his theatre only for a fortnight in the year, is he discharged by paying the plaintiff for that fortnight only? If the Court give its proper meaning to the word “week” in this contract, why not also to the word

(a) Doug. 201.

(b) 6 Bing. 141.

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“year?” Why should not both have their natural interpretation? With respect to the cases cited on the other side, that of *Chaurand v. Angerstein* has no bearing on the present point. The question there was on the sufficiency of a representation to the insurers, not on the meaning of the contract. The case of *Cockran v. Retberg* is thus remarked upon in *Abbott on Shipping*(a):—“The word ‘days,’ used alone in a clause of demurrage for unlading in the river Thames, is said to be understood of working days only, and not to comprehend Sundays or holidays, by the usage among merchants in London; but it is much better to mention *working* or *running* days expressly, according to the intention of the parties.” *Smith v. Wilson* no doubt gives the true rule, (for which *Parke, J.*, there refers to *Starkie on Evidence*, vol. 3, p. 1033), that, “where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible, for the purpose of *applying* the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties, in framing their contract, had made use of a foreign language, which the Courts are not bound to understand.” *Hutton v. Warren* and *Regina v. Stoke-upon-Trent* fall within the same class—where a customary incident is annexed to the contract. Here the contract is at a certain rate per week for three years. The term “*per week*” imports each and every week. And why is the word “year” to be cut down to mean a *season* which may be much less than a year? It is in truth altering an absolute contract into a conditional one—namely, that the plaintiff shall be paid for each and every week of the year, *provided* the theatre be open during that time. No such thing is known to the law as a “theatrical season;” it depends upon the pleasure of each individual manager. To avoid being dependent upon

(a) 8th edit. 264.

that, the plaintiff stipulates expressly that she shall be entitled to salary for the year.

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ALDERSON, B.—I am of opinion that the evidence was properly admitted, and the question properly left to the jury, and therefore that this rule ought to be discharged. It is perfectly true that you have no right to qualify or alter the effect of a written contract by parol evidence; but it is perfectly competent to you to qualify or alter by parol evidence the meaning of the words which apparently form the written contract, and to insert the true words which the parties intended to use. That is not to alter the contract, but to shew what the contract is. Wherever the words used have, by usage or local custom, a peculiar meaning, that meaning may be shewn by parol evidence. Here the contract is, that the plaintiff is to be paid, *for three years*, a salary of £5, £6, and £7 per week in those years. That means, according to the evidence and the finding of the jury, that she is to be paid so much per week during every week that the theatre is open in those years.

ROLFE, B.—I am of the same opinion. There has not been in this case any infringement of the rule that parol evidence cannot be received to alter a written contract; for here the evidence was admitted only for the purpose of explaining the meaning of the words used in the contract. It is clear that this may be done with respect to foreign words or scientific expressions; and I think the same is true of a case where the words of the contract have reference to a particular profession. I wish, however, to guard myself against being supposed to say, that where a certain usage exists, and the parties have put the terms of their agreement into writing, they can say that the agreement is to receive a different construction, because it is contrary to the usage. No such question arises in the present case.

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PLATT, B.—The only question in this case is, what was the contract which the parties entered into. The parol evidence amounted to nothing more nor less than *translating* the contract.

POLLOCK, C. B., concurred.

The Court, however, on the application of the plaintiff's counsel, allowed the rule to be made absolute to enter a nonsuit, instead of a verdict for the defendant.

Rule accordingly.

LAURIE and Another v. DOUGLAS and Others (a).

A vessel laden with goods arrived in the port of London, and was taken into the Commercial Dock to discharge her cargo. For this purpose she was fastened by tackle, on the one side to a loaded lighter lying outside her, and on the other to a barge lying between her and the wharf. The crew were discharged, except the mate, and lumpers were being employed in unloading

her, when the tackle broke whereby she was fastened to the lighter, and in consequence she canted over, water got in through her ports, and the goods still on board were damaged:—*Held*, that this was a loss within the exception in the bill of lading, of "all and every the dangers and accidents of the seas and navigation."

*Held*, also (in an action by the freighters against the shipowners to recover damages for this loss), that the jury were properly directed, "that the owners were only bound to take the same care of the goods as a person would of his own goods, that is, an ordinary and reasonable care."

(a) Decided in Trinity Term (June 12).

ship, from Quebec aforesaid to London aforesaid, and at London aforesaid, in the like good order and well conditioned, to be delivered to the plaintiffs, all and every *the dangers and accidents of the seas and navigation* of whatsoever kind or nature excepted; and in consideration of the premises, and of certain freight and reward to be therefore paid to the defendants by the plaintiffs, they the plaintiffs then, to wit, on the day and year aforesaid, promised the plaintiffs to take due and proper care of, and safely and securely to carry, convey, and deliver the goods and merchandizes aforesaid, in manner aforesaid, except as aforesaid. Averment, that the defendants then had and received the said goods and merchandizes, to be taken care of, carried, conveyed, and delivered as aforesaid, and that a reasonable time for the conveying and delivering of the same had elapsed before the commencement of this suit, and that the defendants were not prevented from carrying, conveying, and delivering the said goods and merchandizes as aforesaid, by any danger or accident of the seas or navigation, of whatsoever nature or kind; yet the plaintiffs say, that the defendants disregarded their said promise, and did not nor would take due and proper care of the said goods and merchandizes as aforesaid, or safely and securely carry, convey, and deliver the same in manner aforesaid, but therein wholly failed and made default, in this wise, to wit, that though they did deliver to the plaintiffs the said barrels of potash and pearlash, in pretended performance of their said promise, yet the said goods and merchandizes were, by and through the default, neglect, and improper conduct of the defendants, their mariners and servants, and for want of the due and proper care and diligence of the defendants, and their mariners and servants, in that behalf, greatly spoiled, injured, lessened, diminished, and deteriorated in quality, quantity, and value.

The defendants pleaded, first, as to so much of the alleged breach of promise as relates to the not taking due

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and proper care of the said goods and merchandizes, and not safely and securely carrying and conveying the same from Quebec to London, that they did take due and proper care of the said goods and merchandizes, and did safely and securely carry and convey the same from Quebec to London, according to their promise in that behalf; and, secondly, as to so much of the alleged breach of promise as relates to the not delivering the said goods and merchandizes to the plaintiffs at London, in good order and well conditioned, that they were prevented from delivering the same in good order and well conditioned by the dangers and accidents of navigation, to wit, by the force of the wind causing the said vessel to upset and be overturned, and the said goods and merchandizes to be thereby wetted, damaged, spoiled, and deteriorated in value.—Issues thereon.

At the trial, before *Pollock*, C. B., at the sittings in London after last Hilary Term, the following facts appeared in evidence.

In May 1845, the ship *Zealous*, of which the defendants were owners, loaded at Quebec a general cargo for London, consisting almost entirely of timber, with the exception of the 53 barrels of potash and 6 barrels of pearlash belonging to the plaintiff, which formed the subject of this action. The bill of lading was dated 20th of May, 1845, and was as follows:—

“ Shipped in good order and well conditioned, by A. Laurie & Co., of Quebec, in and upon the good ship called the *Zealous*, whereof Wade is master for this present voyage, and now lying in the port of Quebec, and bound for London :

Fifty-three barrels of potash

Six                    ditto    of pearlash

being marked and numbered as per margin, and are to be delivered in good order and well conditioned at the afore-

said port of London, (all and every the dangers and accidents of the seas and navigation, of whatsoever nature or kind, excepted), unto Messrs. James Laurie & Co., of Glasgow, or to their assigns, he or they paying freight for the said goods, at the rate of £30 sterling per ton, &c. In witness," &c.

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The vessel arrived in the port of London, and was reported at the Custom House, on the 1st of July, 1845. She was taken into the Commercial Dock to discharge her cargo of timber, and was fastened by means of a "luff tackle block" from her mast-head to a loaded lighter lying outside her, and from the timber to a barge lying inside, between her and the wharf. On the 4th of July she began discharging her cargo, and continued doing so until the 9th; when, about 6 P. M., as some lath-wood was being delivered through the raft-port into a barge, the hook of the tackle by which the vessel was fastened to the outside lighter broke, and she suddenly canted over, and the raft-port and other ports being open, the water got in, and she remained under water for two days; the consequence of which was, that the plaintiff's potash and pearlash, which were in the hold, were much damaged. At this time the vessel was under the charge of the mate, the captain being absent from the docks. The rest of the crew had been discharged, and lumpers were employed in unloading the cargo.

Upon these facts, the Lord Chief Baron left it to the jury to say, first, whether the injury arose from the perils of the seas in the course of the navigation; and secondly, whether the defendants, by their servants, took due and proper care of the goods; saying that they were only bound to take the same care as a person would take of his own goods, that is, an ordinary and reasonable care. The jury found, that the accident arose from perils of navigation, and that due and ordinary care was exercised: and the ver-



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dict was thereupon entered for the defendants, leave being reserved to the plaintiffs to move to enter a verdict for them with £230 damages.

In Easter Term, *Jervis* obtained a rule nisi accordingly, or for a new trial; against which, in the present Term (May 28),

*Crowder* and *Hugh Hill* shewed cause.—With respect to the issue upon the first plea, which raises the question whether there was due care in the *carriage* of the goods from Quebec to London, it is clear that the defendants were entitled to the verdict, no evidence whatever being given of any want of due and proper care in the carrying of the goods to London; and the only question on the other issue was, whether the injury, whereby the defendants were prevented from *delivering* the goods according to the contract, arose from perils of navigation; and that question was left to the jury. It will be urged on the other side, that the learned Judge ought to have told the jury, as matter of law, that the navigation was over at the time of the injury. [*Pollock*, C. B.—With reference to that part of the cargo in respect to which this action is brought, the voyage was not at an end. A policy of insurance until the discharge of the cargo would still attach.] The question is, what is the meaning of the exception, “all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind.” Here the goods still remained in the vehicle of carriage, and on the water, subject to the perils of navigation; for “navigation” does not mean upon the open sea only, but until delivery of the cargo. It is said the voyage was at an end, because the crew had been discharged. [*Pollock*, C. B.—It might as well be said the voyage was not begun until the arrival of a ship at Gravesend, where they often take in part of the crew.] The contract stated in the declaration, out of which the exception is made, is a contract for the goods to be safely and securely

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carried and conveyed to London, and there in good order and condition *to be delivered to the plaintiffs*; and the question is, whether the defendants were prevented from *delivering* the goods in good order and condition, by a danger of navigation within the meaning of the exception. The defendants must have meant to excuse themselves from any accident arising while the ship was still floating on the water, and subject to its perils. Suppose the whole of the cargo is to be delivered on the further side of a dock, and an injury occurs in the course of crossing it, would not that be within the exception? *Navigation* means all that is necessary to carry the goods to the land, in the ordinary course of the shipowner's duty. [On this part of the case they referred to *Fletcher v. Inglis* (a), *Thompson v. Whitmore* (b), *Bishop v. Pentland* (c), *Carruthers v. Sydebotham* (d), *Kingsford v. Marshall* (e), and *Wells v. Hopwood* (f).] First, was the navigation ended? That is a question of *fact*, not of *law*, and the jury have found that it was. Secondly, was this a peril of navigation? That question is fully discussed in Abbott on Shipping, pp. 339—341 (6th Edit.), where the cases are collected, and are clearly extensive enough to include such an injury as this. The plaintiffs say, that if there was negligence on the part of the defendants which also conduced to the loss, it cannot be considered as having happened by a peril of navigation; and with reference to this point they complain of the direction of the learned Judge, as to the *amount* of care which the defendants were bound to take. But it is submitted that the direction in this respect was perfectly correct, and that they were only bound to take such ordinary and reasonable care as a prudent man would take of his own goods. In order to render the owner liable in such a case, he must be fixed with such a degree of negligence as would, before the

(a) 2 B. &amp; Ald. 315.

(b) 3 Taunt. 227.

(c) 7 B. &amp; Cr. 219.

(d) 4 M. &amp; Sel. 77.

(e) 7 Bing. 458.

(f) Cit. Id. 464.

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Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68, have been necessary to render a carrier liable, notwithstanding a notice limiting his liability; that is, the want of such care as a prudent man would take of his own property: *Bodenham v. Bennett* (a), *Lowe v. Booth* (b), *Wyld v. Pickford* (c), Story on Bailments, c. 1, s. 7.

*Jervis* and *Greenwood*, in support of the rule.—First, this was not a peril of navigation. It is said on the other side that it was, inasmuch as the goods had not reached their destination. If so, the defendants are in this dilemma—that they did not safely *carry* and *convey* the goods, and so the plaintiffs are entitled to the verdict on the first issue. But the important fact to be considered is, that here the vessel had discharged her crew before the injury happened. If the shipowner is still to have the benefit of the exception he must take upon himself all the burthen of keeping the ship in the course of navigation. By discharging the crew, he unfits her to meet that which is an accident of the navigation. This is the case of a *common law insurance*, limited by a specific exception of the “dangers and accidents of navigation.” That means no more than this, that so long as the vessel is in the course of and fitted for navigation, the owner is protected against any peril of that navigation, which is not induced by his negligence. Here the vessel was not in the course of or fitted for navigation. *Thompson v. Whitmore* is almost expressly this case. [*Pollock*, C. B.—There the ship was hove down on a beach, within the tide-way, for repair. It was the same as if she had been put into a dry dock for the same purpose.] The other cases cited were cases arising on policies of insurance, where the question is a different one.

Secondly, the direction of the learned Judge, as to the

(a) 4 Price, 34.

(b) 13 Price, 329.

(c) 8 M. & W. 460.

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degree of care which the defendants were bound to use, was not correct. A carrier is an insurer, although no doubt he may by contract engraft an exception upon his common-law liability. He warrants the *mode of carrying* the goods, as well as their safe delivery. He contracts to have a proper vehicle wherein to carry them—a fit vessel, and a crew exercising proper care: and it is upon that contract that the exception is engrafted. His liability compels him to have a well-found ship in every respect. This term—“the dangers and accidents of navigation”—cannot therefore mean the same as “perils of the sea” in a policy of insurance, but is limited to *mere accidents*, proper care being used in every respect. This is the case of a bailee *for hire*; it is only a *gratuitous* bailee who is in the same situation as if the goods were his own. The responsibility of a bailee for hire is greater. *Forward v. Pittard* (a) shews that a carrier is liable at common law for a loss by fire, proceeding from any other cause than lightning. Suppose the crew improperly discharged all the timber at once, and the vessel in consequence inevitably pitched over and was stove in—can it be said the owner would not be liable? The exception is out of the absolute liability to deliver, and the owner must discharge himself of all the responsibility which the law casts upon him, before he reaches this exception. Negligence consists in the omission of any care which is thrown upon the party by the circumstances in which he is placed; and here the “due and proper care” means due and proper care *as a carrier*. Would not bad stowage, or loss from drunkenness of the crew, prevent the application of this exception? Vinnius (b) lays down the rule thus;—“Ad casus autem fortuitos non sunt referendi illi casus, qui cum culpa conjuncti esse solent; cujusmodi sunt furta. Quamobrem, qui rem furto amissam, vel incendio, verbi causâ,

(a) 1 T. R. 27.

(b) Ad Inst., lib. 3, tit. 15, s. 5; cited, 3 Burge's Com. 661.

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*servorum negligentia orto, consumptam dicit, is diligentiam suam probare debet.*" The question of negligence, therefore, is involved in the consideration of this exception; and it is not merely the proximate cause of the loss which is to be considered, but the degree of negligence which is to create the liability must be measured by the degree of care which the law casts on *the* party under *the* circumstances.—They referred to Jones on Bailments, 21; Story on Bailments, 320; 2 Kent's Commentaries, 598, 609; 3 Burge's Commentaries, 690.

Cur. adv. vult.

The Court (*a*) now delivered their judgment, holding that the navigation was not at an end at the time of the loss, and that the Lord Chief Baron had correctly directed the jury as to the degree of care which the defendants were bound to take of the goods (*b*).

Rule discharged.

- (*a*) Pollock, C.B., Alderson, B., Rolfe, B., and Platt, B.      fortunately absent when this judgment was delivered, and have not been able to obtain a copy of it.
- (*b*) The Reporters were unfor-

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FLETCHER v. MARSHALL and Another.

June 27.

**ASSUMPSIT.**—The first count of the declaration stated, that on the 30th September, 1845, divers persons, whose names are to the plaintiff unknown, had agreed together to form a certain joint-stock company, to be incorporated by act of Parliament, to be applied for and sought to be obtained and procured to be passed, for the construction of a certain railway, to wit, from Thelford to the Eastern Counties Railway, at Hatfield, near Chelmsford, and thence to the port of Maldon, to be called “The Essex and Suffolk Railway Company,” upon and according to, amongst others, certain terms and regulations following:—(that is to say) The capital of the said company to consist of £1,000,000, in 40,000 shares of £25 each, which shares were to be allotted to such persons as should apply for the same, and should be appointed by the committee of management of the said company as shareholders therein; and certain writings, called “scrip certificates,” were to be issued by the said committee of management, each of which was to purport that the holder thereof was entitled to so many shares of and in the capital of the said intended company as should be therein mentioned, and to become shareholders thereof in respect of the same; and before the making of the promise hereinafter mentioned, divers, to wit, all the said shares had been allotted to divers persons, and such scrip certificates as aforesaid were about to be issued. And thereupon, to wit, on the day and year first aforesaid, in consideration that the plaintiff, at the request of the defendants, then employed the defendants to purchase for him the plaintiff divers, to wit, fifty of the said shares in the

A sharebroker employed to purchase shares or scrip of a railway company, does not thereby undertake to procure them absolutely and at all events, but only to use due and reasonable diligence to endeavour to do so.

A. employed B., a sharebroker at Manchester, and lodged money in his hands, to procure for him fifty shares in a certain railway company. B., without disclosing the name of his principal, entered into a contract with H., another sharebroker, to purchase them for him. According to the usage of the Stock Exchange at Manchester, there are two “settling days” in each month, on which all transactions between brokers, and between them and their principals, are to be settled,

although in some instances settlement is not enforced by brokers on the prescribed days. H. did not perform his contract with B. by the next settling day; and B. having, after that day, refused to return A. his money:—*Held*, that A. was entitled to recover it back from B. in an action for money had and received.

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said intended company, at a reasonable price in that behalf, and to procure for him such scrip certificates for the said shares as aforesaid, when the same should be issued by the said company, at and for commission and reward to the defendants in that behalf, the defendants then promised the plaintiff to purchase the said shares for him, the plaintiff, and to procure and deliver to him such scrip certificates for the same as aforesaid, *when the same should be issued as aforesaid, on being paid the purchase-money thereof, and such commission as aforesaid.* And the plaintiff says, that he has always performed the said agreement in everything on his part to be performed, and that after the making thereof, and before the issuing of the said scrip certificates, to wit, on the day and year aforesaid, the defendants, in part pursuance of their said promise, bought for the plaintiff the said fifty of the said shares, at and for such price as aforesaid, to wit, 2*l.* 6*s.* 9*d.* per share; and that afterwards, to wit, on the 14th of October in the year aforesaid, scrip certificates for divers, to wit, all of the shares in the said intended company, were issued by the said persons as aforesaid, and that within a reasonable time in that behalf, to wit, on the day and year last aforesaid, the plaintiff paid to the defendants the said purchase-money, together with their said commission, amounting, to wit, to 121*l.* 17*s.* 6*d.*, and then requested the defendants to procure for and deliver to him such scrip certificates as aforesaid, in pursuance of their said promise; and the defendants then could and might have so procured and delivered the said scrip certificates, and a reasonable time so to do had elapsed before the commencement of this suit; yet the defendants have not procured and delivered the said scrip certificates to the plaintiff, but have wholly neglected and refused so to do, by reason whereof the plaintiff has wholly lost the benefit of the said purchase, and of the said scrip certificates, and of divers great gains and profits which he would have made by the same; and by reason of a fall in the value of the said

shares, the plaintiff has been greatly damnified by being unable to dispose of the same.

There were also counts for money lent, money had and received, and money due on an account stated.

Pleas, first, to the whole declaration, non assumpsit; secondly, to the first count, that a reasonable time for the defendants to have procured and delivered the scrip certificates to the plaintiff had not elapsed before the commencement of the present suit. Issues thereon.

At the trial, before *Coleridge*, J., at the last assizes at Liverpool, it appeared that the plaintiff had, on the 30th of September, 1845, employed the defendants, who are stock and share brokers at Manchester, to purchase for him fifty shares in the Essex and Suffolk Railway Company. The defendants, without disclosing the name of their principal, immediately made a bargain for that number of the shares with a sharebroker of the name of H., and sent the following bought note to the plaintiff:—

“ 5, Town-hall buildings, Manchester,  
“ To J. Fletcher, Esq. Sept. 30, 1845.

“ We have this day bought on your account fifty shares in the Essex and Suffolk Railway, at 2*l*. 7*s*. 6*d*. per share.

“ We are, Sir,

“ Your obedient Servants,

W. & E. MARSHALL.

£	s.	d.	
“ 118	15	0	paid, and
3	2	6	premium and commission
<hr/>			
£121	17	6	net.”
<hr/>			

According to the practice of the Stock Exchange at Manchester, there were two days in each month on which all accounts between brokers, and between brokers and their customers, were to be settled; in pursuance of which regulation all sales after the 27th September were understood

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to be for the 14th October, the next settling day. The defendants also, in accordance with the practice of other brokers, published lists of the different railway shares in the market on each day, together with the prices of them.

The following account and receipt were put in evidence on the part of the plaintiff:—

“ J. Fletcher, Esq., in account with W. & E. Marshall.

<i>Dr.</i>	£	s.	d.
“ Sept. 30—To 50 Essex and Suffolk - -	121	17	6
Oct. 6—To 20 Chester and Manchester			
Direct - - - - -	71	5	0
	<hr/>		
	£193	2	6
	<hr/>		

<i>Cr.</i>	£	s.	d.
“ Sept. 30—By cash - - - - -	30	0	0
Oct. 4—Ditto - - - - -	20	0	0
Balance - - - - -	143	2	6
	<hr/>		
	£193	2	6
	<hr/>		

“ Dr. to Balance £143 2s. 6d.

“ Settled, October 14, 1825.

E. MARSHALL.”

On the 24th October the plaintiff went to the defendants, and asked if they had not bought for him fifty shares in the Essex and Suffolk Railway; and one of the defendants replying that they had, the plaintiff demanded his scrip or his money, observing that they had treated him very ill, by making use of his money, and not getting him his scrip. To this the defendant replied that they were not using his money, and had not paid it away, and that they had purchased the scrip on the 30th September of Mr. H., but that it had not yet been delivered to them, as things of that nature could not always be procured when

required. On the same day, the plaintiff's attorney, by his instructions, wrote to the defendants demanding payment of the 121*l*. 17*s*. 6*d*., which not being complied with, the present action was commenced on the 31st October. It appeared that, although scrip had been issued by the Essex and Suffolk Railway Company some time before the 14th of October, none had reached Manchester before that day, and Mr. H. did not receive any until the 11th November, when he delivered it to the defendants.

On this state of facts, it was objected for the defendants, at the close of the plaintiff's case, that this action was not maintainable; for that the implied contract between the parties was, that the broker undertook to use due diligence to procure and deliver this scrip, not, as alleged in the first count, that he was to procure and deliver it at all events. It was also contended that, under the circumstances, the plaintiff could not recover under any of the common counts. The plaintiff's counsel thereupon applied to the learned Judge to amend the first count by striking out the words "when the same should be so issued as aforesaid, on being paid the purchase-money thereof and such commission as aforesaid," and inserting in their stead the words "within reasonable time in that behalf." The learned Judge granted this application, reserving leave to the defendants' counsel to move to enter a nonsuit, as well on the question of variance, as on the propriety of making the amendment. As to the common counts, his Lordship expressed his opinion, that, the contract being to deliver this scrip within a reasonable time, the plaintiff had a right to rescind it, if not completed within that time, and to recover back his money under the count for money had and received to his use. Witnesses were then called for the defendants, to prove that it was often difficult to get particular kinds of shares or scrip, and that the defendants had taken considerable pains to procure these for the plaintiff. It was shewn also, that during the months of September and October, 1845,

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there was a vast quantity of business transacted in the share market at Manchester. Some of the witnesses also stated, that in many cases brokers did not enforce the delivery of shares or scrip on the regular settling days, and frequently allowed transactions to lie over for some time, as suited their convenience. The learned Judge, in summing up, told the jury that they would probably entertain no doubt that the contract laid in the declaration, as amended, was proved; and if so, the question for them to determine was, whether the breach was proved, namely, that a reasonable time for completing the contract had elapsed when this action was brought. In determining this question, the jury should be guided by the rules generally observed in dealings of this nature, and not by what took place in particular transactions; and if they thought fourteen days had been fixed by usage as a reasonable time, the plaintiff was entitled to their verdict. The jury found a general verdict for the plaintiff, with 12*l.* 17*s.* 6*d.* damages.

In Easter Term, *Watson* moved for and obtained a rule nisi to enter a nonsuit or new trial, on the grounds, that the contract proved by the evidence was not properly described in the first count of the declaration, even as amended; and that the learned Judge had misdirected the jury, in stating to them that the contract alleged was proved, and also in laying it down that the plaintiff was entitled to recover on the count for money had and received; for that as the defendants had, by their agreement with H., bound themselves absolutely to him for the purchase of the shares, it was not in the plaintiff's power to revoke that contract.

*Martin* and *Cowling* shewed cause.—First, the plaintiff is clearly entitled to recover on the count for money had and received. The engagement of the defendants was to purchase this scrip for the plaintiff, and deliver it to him on the 15th of October, or within a reasonable time. If the

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former, then the plaintiff was entitled to have back his money on the 16th; if the latter, then the jury have found that until the 24th was a reasonable time for the completion of the contract. And this finding was fully supported by the evidence. It was shewn that, by the general usage of the Manchester Stock Exchange, the reasonable time for the completion of such a contract was fixed to be at the next settling day: and such a general usage cannot be controlled or affected by any practice of individual brokers to the contrary. It was said, however, that the defendants could not be held bound to fulfil their engagement with the plaintiff, in consequence of H.'s not having fulfilled his engagement with them; but that argument cannot be admitted. The plaintiff was dominus contractûs, and had a right to prohibit his agent from giving additional time for the performance of it to a third party.

Secondly, there was evidence to sustain the first count. A broker is in the nature of a *del credere* agent, and binds himself, independently of any acts or defaults of others, to procure the article which he undertakes to purchase for his principal. [*Rolfe*, B.—Suppose there were no such shares in the market? Or, as there is in general an indefinite supply of such articles, take the case of some other. A man may employ his broker to buy a picture generally, which might easily be done; but suppose he employed him to buy Raphael's Transfiguration?] In the case of shares, the broker's price lists shew what shares are on sale in the market. [*Parke*, B.—No; they only shew the nominal price which the brokers affix on the shares for that day. If a broker is bound to purchase absolutely, at what price is he to purchase?] At the price of the day on which the order is given. [*Parke*, B.—Suppose I give an order to sell 1000 shares. You say the obligation of the broker would be to sell them at the price of that day. But it is plain that the instant effect of his going into the market with that number of shares for sale, would be to lower the

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market; and still he would be bound to sell at the price of that day. That seems to be a clear *reductio ad absurdum*.] In the account furnished by the defendants to the plaintiff, they admit that they have *bought* these shares; whether that statement be true or not, they are bound by it, and therefore lay under a contract to *deliver* them. [*Parke, B.*—Then the special count is wrong, for it does not so describe the contract; it describes it as a contract by the brokers to procure this scrip at all events, whether they obtain it themselves or not. But that is not so; the duty of the broker is only to use due and reasonable diligence in endeavouring to procure it. You must be confined to the count for money had and received.]

*Atherton*, in support of the rule.—The plaintiff is not entitled to recover on the count for money had and received. The question on that count is, whether the defendants did or did not use due diligence to procure these shares within a reasonable time. Now, the question of *reasonable time* is one which must depend on the circumstances of each case. In this case the learned Judge was wrong in telling the jury that they ought to fix the reasonable time by the settling day; for there was abundant evidence that the brokers at Manchester were not in the habit of considering themselves bound to complete their bargains on the settling days. In truth, it would be impossible in many cases to do so; e. g., where the scrip has to pass through a great number of hands, or where the parties reside at a distance. The question of reasonable time, with reference to the special count on which the direction of the learned Judge and the verdict of the jury proceeded, and which the Court now considers not to be sustainable, is altogether different from the same question viewed with reference to the count for money had and received: being simply whether a reasonable time had elapsed for the absolute *delivery* of the scrip—not whether the de-

fendants had a reasonable time in which to endeavour to procure it.

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PARKE, B.—I think it is impossible to entertain any doubt as to the plaintiff's right to recover on the count for money had and received. He employed the defendants to make a bargain for shares, to be delivered to him within a reasonable time, and the meaning of that expression is explained, by the usage of the business of brokers at Manchester, to be until the next settling day, although they are in the habit of occasionally extending indulgence to each other beyond that time. The contract was made on the 30th September; and according to this usage the scrip was to be delivered on the 15th of October. On the 24th of that month, the plaintiff inquires of the defendants if they have got the scrip; they reply that they have not; on which he ascertains that they have still got his money, and countermands the application of it, as he unquestionably had a right to do. If the contract which the defendants had made with H. was on the terms that the scrip was to be delivered on the 15th, then a delivery on that day was an essential part of the contract; and on its being broken by H., the defendants were bound to repay the plaintiff his money, and not to pay it over; and if the contract was not made on that condition, they had no right to pay the money over at all. In either view, therefore, the plaintiff was entitled to receive back his money. If any reason could be assigned why the jury should have come to a different conclusion as to what was reasonable time under this count, from that which they came to on the special count, it would be a ground for a new trial; but it is clear that they have proceeded on the ground that the 15th of October was the reasonable time for the delivery of the scrip in both cases. With respect to the first count, I own I think it is not sustained by the evidence, and that the defendant would be entitled to a new trial for misdirection

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on that count; but in conformity with the course taken by us in another case yesterday (*a*), if the plaintiff will consent that a verdict be entered for the defendants on the general issue to the first count, the present rule may be discharged.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule absolute to enter a verdict for the defendants on the plea of non assumpsit to the first count, and discharged as to the rest.

(*a*) *Hughes v. Hughes*, ante, 701.

July 4.

SHERWOOD v. CLARK.

A writ of elegit cannot be sued out for part only of the sum recovered by a judgment, unless it shews on the face of it that the residue of the judgment has been satisfied or otherwise disposed of.

Since the 1 & 2 Vict. c. 110, s. 11, an elegit need not describe the lands to be extended by metes and bounds; it is sufficient to describe them in any manner by which they may be identified.

THIS was a rule obtained by *Martin*, calling upon the plaintiff to shew cause why the writ of elegit, and all subsequent proceedings, should not be set aside, and why the plaintiff should not pay to the defendant the costs of and relating to the application, and consequent thereon.

Cause was shewn by *Montagu Chambers* and *Bovill* in Trinity term (May 23), and the Court took time to consider.

The facts are fully stated in the judgment of the Court, which was now delivered by

PLATT, B.—This was a rule calling upon the plaintiff to shew cause why the writ of elegit, and all subsequent proceedings thereon, should not be set aside, and why the plaintiff should not pay to the defendant the costs of and relating to the application, and consequent thereon.

On the 24th of November, 1836, the plaintiff recovered in an action of covenant £2000 for his damages and costs against the defendant.

On the 13th of December, 1844, a *scire facias quare executionem non* issued upon that judgment.

Judgment in *scire facias* having been obtained, a writ of *testatum fieri facias* issued into Sussex thereon on the 4th of April, 1845, to which the sheriff returned *nulla bona*.

On the 7th of February, 1846, a writ of *elegit* issued, directed to the sheriff of Sussex, whereby, after reciting that the plaintiff, on the 24th of November, 1836, recovered against the defendant £2000, which in the Court were awarded to the said plaintiff for his damages which he had sustained, as well by reason of a certain breach of covenant made between the said defendant and the said plaintiff, as for his costs and charges by him about his suit in that behalf expended, whereof the said defendant was convicted; and that afterwards the said plaintiff came into Court, and, according to the form of the statutes, chose to be delivered to him the goods and chattels of the defendant, except his oxen and beasts of the plough, and also all such lands and hereditaments as the defendant, or any one in trust for him, was seised or possessed of on the 24th of November, 1836, (but omitting altogether to notice the judgment in *scire facias*), the sheriff was commanded to deliver by reasonable price and extent the defendant's goods and lands, till £12,000 with interest should have been levied.

The inquisition, also, taken under this writ on the 17th of February, 1846, and returned by the sheriff on the 24th of the same month, omitted to describe by metes and bounds the lands extended.

In Easter Term, the defendant obtained a rule nisi to set aside the *elegit* and subsequent proceedings. The defendant's counsel objected—first, that the *elegit* should have stated the judgment in *scire facias*; secondly, that, without shewing that the residue of the original judgment had been satisfied or otherwise disposed of, an *elegit* could not be sued out for part only of the sum recovered;

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thirdly, that the inquisition should have stated the metes and bounds of the land extended.

At common law, the demandant in a real action, having allowed a year and a day to elapse after the recovery of his judgment, might have sued out a scire facias to revive that judgment. The plaintiff in a personal action, if guilty of the same neglect, could not revive by scire facias, but was driven to bring his action on the judgment. That was the only remedy a plaintiff in a personal action, who had allowed a year and a day to elapse without suing out execution, retained before the passing of the statute of Westminster 2, 13 Edw. 1, st. 1, c. 45. But that statute, in giving to such a plaintiff an additional remedy, points out the course in which it is to be pursued. It directs, that in such cases the sheriff shall be commanded that he make known to the party of whom the complaint is made, that he be before the justices at a certain day, to shew if he has anything to say why the matter enrolled should not be executed, and if he do not come on the day, or come and can say nothing why execution ought not to be made, the sheriff shall be commanded to cause the thing enrolled to be executed.

The date of the original judgment, apparent on the face of the writ, shews that the plaintiff could not have been entitled to execution before he had obtained a judgment in scire facias. But the writ omits to state that any such judgment has been obtained. It is, however, unnecessary for the Court to express any opinion upon the effect of this omission in order to dispose of this rule. As to the second objection, *Webber v. Hutchins*(a), in which a fieri facias was set aside on the ground of the mandatory part of it requiring the sheriff to levy for an amount less than the sum recovered by the judgment, without accounting for the residue, is in point.

(a) 8 M. & W. 319.

With regard to the third objection, the received doctrine resulting from the cases on this subject was, before the 1 Vict. c. 116 came into operation, that the sheriff in general was bound to take and return an inquisition, describing the lands with convenient certainty; and after it was taken, to deliver to the plaintiff a moiety by metes and bounds, the object of such delivery being to define with certainty the portion which the plaintiff was to be entitled to hold thereafter as tenant by elegit. Thus, in *Fenny d. Masters v. Durrant*(a), the Court of King's Bench held a return of the sheriff, stating generally that he had delivered to the plaintiff a moiety of the messuage and lands of which the jury had found the defendant seised, to be void, because it did not shew of what particular part of the messuage and lands the moiety delivered consisted. But where the moiety could be sufficiently designated without the addition of metes and bounds, their introduction was unnecessary. This was decided in *Doe d. Taylor v. The Earl of Abingdon*(b). In that case the sheriff returned an inquisition, finding by name all the different farms and tenements of which the defendant's estate in the county consisted, their value, the number of acres, more or less, the tenants' names, yearly value besides reprises, and the clear yearly amount of the whole, and then repeating the names of a certain number of them, their number of acres more or less, and the yearly amount; further finding that those particular farms and tenements were a true and equal moiety of all the said lands and premises of the defendant; the sheriff then returned as follows:—"Which moiety of the said lands and premises I, the said sheriff, on the day of taking the inquisition, have caused to be delivered to the lessor of the plaintiff by the price and extent aforesaid." Yet the inquisition and return were supported, as the description of

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(a) 1 B. &amp; Ald. 40.

(b) 2 Doug. 473.

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the moiety, although without metes and bounds, sufficiently distinguished from the rest of the lands and premises the portion delivered to the lessor of the plaintiff.

The object, therefore, of introducing metes and bounds having been to distinguish one moiety from the other when a moiety only of the lands could be taken in execution, the 11th section of the 1 Vict. c. 110, by enabling the execution-creditor to obtain, under an *elegit*, possession of the whole of the execution-debtor's lands, has operated to abolish the necessity of that distinction. Wherefore the introduction of metes and bounds has by that act been rendered unnecessary, and consequently the third objection fails (*a*).

On the second objection the rule must be made absolute.

Rule absolute.

(*a*) See *Doe d. Roberts v. Parry*, 13 M. & W. 356.

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## IN THE EXCHEQUER CHAMBER.

*(In Error from the Court of Exchequer.)*

WOODROFFE v. DOE d. DANIELL and Others.

June 18.

THE Court of Exchequer having given judgment for the plaintiffs below in this case (*a*), the special case was, pursuant to the leave reserved for that purpose, turned into a special verdict, and a writ of error was brought by the defendant below upon that judgment.

An estate being limited by marriage settlement to the use of A. and his wife, and the heirs of their bodies, and A. having died, leaving

his widow and three children, viz. G. an only son and L. and H. daughters, the widow, in 1735, by deed poll, in consideration of an annuity granted to her by her son G., and of natural affection, granted, surrendered, and yielded up the estate to G. in fee; and he afterwards, during her life, suffered a recovery. The widow died in 1767; G. died without issue in 1779, having devised the estate to trustees to secure the payment of an annuity to W., the only son of his sister L. (who was then dead), and subject thereto to B., the eldest son of W., for life, with remainder to his second son. In 1790, B. entered, on his father's death, into possession of the entirety of the estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life. In 1814, he suffered a recovery of one moiety, and in 1816 conveyed the entirety of the estate to mortgagees in fee. In 1818, M., the descendant of the other coparcener, H., at B.'s request, suffered a recovery of a moiety, which it was declared should enure (subject to a term to secure a sum of money to M.) to the use of B.'s mortgagees:—*Held*, on error, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer): 1. That the deed poll of 1735 operated as a covenant to stand seised, and created a base fee, determinable by the entry of the issue in tail. 2. That this base fee did not, on the death of the widow, become merged in the reversion in fee in G., as the estate tail subsisted as an intermediate estate; and that although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued till his death, and therefore the period of twenty years, for the operation of the statute of limitations against the issue in tail, was to be calculated from G.'s death in 1779, and not from the death of his mother in 1767; and that B.'s entry in 1790 was not barred by lapse of time. 3. That although B. entered under the will, and manifested an intention to take the estate under it, for his life only, that intention was immaterial, and he was remitted, nolens volens, as to his moiety, to the original estate tail, which was barred by the recovery in 1814.

*Held* also (reversing the judgment of the Court of Exchequer), that the entry and remitter of B. did not operate to remit M., his coparcener, to the other moiety of the estate.

(*a*) See the report, 10 M. & W. 608, where the facts are fully set out. See also post, p. 784.

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The case was argued in this Court on the 18th of June, 1844 (a).

*Humphry*, for the plaintiff in error.—There is no doubt that the deed of 1735 operated as a covenant on the part of Hester Woodroffe to stand seised to the use of her son George in fee, and that it had the effect of creating a base fee in him. And it is conceded on the other side, that George Woodroffe was not himself remitted to his title under the estate tail created by the settlement of 1710, the recovery suffered by him having estopped him from being so remitted. But the first argument on the part of the plaintiff in error is, that neither was William Billinghamurst, nor Woodroffe, so remitted.

The base fee of which George Woodroffe became seised by the operation of the deed of 1735 was a devisable estate, *Doe d. Cooper v. Finch* (b), but subject to be defeated by the entry, or the exercise of rights of action, by the issue in tail. This estate George Woodroffe by his will devised to trustees, with remainder to the use of William Billinghamurst, afterwards Woodroffe, for life, with remainder to his first and other sons in tail. William Billinghamurst being therefore tenant for life of part of the base fee, his possession enured for the benefit of the base fee generally. He entered under and on the faith of the will, and such his entry cannot be considered as operating adversely to the very will under which he claimed and took the estate. The doctrine, that one who enters upon lands must necessarily enter in respect of every title which he has, is not maintainable. If a man enters generally, his entry goes to the whole fee; but if he enters with reference to a particular estate only, the entry enures only to that particular estate. It is analogous to the case of encroachments made

(a) Before Lord Denman, C. J., J., and Cresswell, J.  
*Patteson, J., Williams, J., Coleridge, J., Coltman, J., Maule,*  
 (b) 4 B. & Adol. 283.

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by a lessee. If a tenant holding under a lease incloses from an adjoining waste, and keeps possession of it to the end of his term, this possession is referred to his estate under the lease, and he does not acquire the fee: *Bryan d. Child v. Winwood* (a), *Doe d. Challnor v. Davies* (b). All the acts done by William Woodroffe are so many acknowledgments that he entered and held only under the will, and for the estate granted by the will. In the case of *Doe d. Barrett v. Keen* (c), which was relied on as to this point for the plaintiffs below, the entry is expressly declared to have been made generally, and the judgment of the Court proceeded on that ground. Before, however, this point is arrived at, other questions occur. And, first, remitter applies only where the issue has a *right of entry*. Now George Woodroffe had himself the reversion immediately expectant on the determination of the base fee created by the deed of 1735; and when the base fee also vested in him, a merger took place. That drove the issue in tail to their *action* of formedon, and took away their right of entry, and so there could be no remitter. Again, a covenant to stand seised operates entirely under the Statute of Uses, and the question arises, whether remitter applies at all to the case of a title depending on that statute. The anonymous case from 3 Leon. 93, cited in the judgment of the Court below, is not, when examined, adverse to the argument for the plaintiff in error upon this point. There the wife was held to be remitted; but she never was in by operation of the Statute of Uses. On the death of her husband, she had a right to elect to come in under the stats. 11 Hen. 7, c. 20, and 32 Hen. 8, c. 28, s. 6, which were passed to prevent discontinuance by husbands of estates held by them in right of their wives, instead of under the Statute of Uses. If she had elected to come in under the Statute of Uses, it seems to follow as a consequence, from the

(a) 1 Taunt. 208.

(b) 1 Esp. 461.

(c) 7 T. R. 386.

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judgment of the Court in that case, that she would *not* have been remitted. But it was suggested, that William Billinghamurst did not come in under the Statute of Uses, for that wills do not operate at all under that statute. This subject is fully discussed in the last edition of Sir Edward Sugden's work on Powers, vol. 1, p. 171, and the result at which the learned author arrives, is, that where a seisin is created and limited to uses by a will, those limitations take effect under the Statute of Uses. In *Doe d. Cooper v. Finch* (a), Patteson, J., expresses a distinct opinion, that if a party takes under a will, he takes under the Statute of Uses, and then the doctrine of remitter does not apply. In this will there is a complete devise of the fee,—a complete legal seisin, upon which uses can operate. If, therefore, the Statute of Uses does apply to a will, William Billinghamurst was in by use, and if so, the doctrine of remitter does not apply. That is a long established doctrine: *Duncombe v. Wingfield* (b), *Vavasor's case* (c).

If, however, it be considered, that although George Woodroffe was himself estopped from being remitted, the issue inheritable after him, not being affected by such estoppel, were capable of being remitted; the next answer to their claim is, that they have not entered in time. Remitter applies only where there is an existing right (d). The Statute of Limitations begins to run from the time when a right of entry existed, whether then capable of being enforced or not. The title of the issue in tail in this case first accrued on the death of Hester Woodroffe, in 1767; they could not then enter upon the estate, but the right to determine the base fee then accrued, and George Woodroffe ought then to have done some act to assert his title to the estate tail. This part of the case, it is submitted, is dealt with on an erroneous view in the

(a) 4 B. & Adol. 305.

(b) Hob. 254.

(c) 3 Leon. 53.

(d) Co. Litt. 349. b.

judgment of the Court below. It is assumed in that judgment, that because George Woodroffe, by the recovery of 1735, had estopped himself from setting up the estate tail, and therefore could never afterwards make an entry so as to assert a title inconsistent with the recovery, therefore no right of entry accrued to any person, enabling such person to defeat the base fee until the death of George in 1779. But, supposing George Woodroffe, on the death of Hester in 1767, had merely refrained from asserting his right of entry, it is certain that the time would have begun to run against the succeeding issue in tail from that date: *Tolson v. Kaye* (a), *Cotterell v. Dutton* (b). Can it be, then, that where a party has by his own act estopped himself from taking advantage of a right of entry, the consequences shall be different as regards the application of the Statute of Limitations?

Assuming, however, that there might have been a remitter in this case, remitter is subject to *election*: *Hawtreys case* (c), *Anonymous*, Dyer, 351 b; and there is ample evidence in this case to shew that William Woodroffe, the party upon whose entry the question arises, elected not to be remitted. In the case in Dyer, 351 b., the marginal note by Treby, C. J., is, "The wife in this case had *election*, whether she would be in of her remitter or not; because, if she had been remitted, it would not have been beneficial to any other; for the fine of the husband bars the issue and all others. This reason was given by Dodderidge, Trin. 16 Jac., in the argument of *Barbara Woods v. Sir John Sherly*." It is also expressly put by Patteson, J., in *Doe d. Cooper v. Finch*, as a case to which the doctrine of election is applicable. Where a man has two rights, one of them defeasible and the other not, he has a legal right to disclaim the one and claim under the other. Before the case of *Townson v. Tickell* (d), it was supposed that such

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(a) 3 Brod. & B. 217.

(b) 4 Taunt. 826.

(c) Dyer, 191 b.

(d) 3 B. & Ald. 31.



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disclaimer could only be by matter of record; it was there held that it may be by deed. In that case *Abbott, C. J.*, says, "The law is not so absurd as to force a man to take an estate against his will; *primâ facie*, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge; and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift." Upon the same principle, a man cannot be remitted to a particular estate against his will. The authority of Littleton, sect. 695, was cited as to this point in the judgment of the Court below. It is there said, that "where the entry of a man is congeable, and a lease is made to him, albeit that he claims by words in pais that he hath estate by force of such lease, or saith openly that he claimeth nothing in the land but by force of such lease, yet this is a remitter to him, for that such disclaimer is nothing to the purpose." This cannot now be considered as strictly law. Indeed, when the author says, as he does there, that disclaimer may be by record, that is an authority in favour of the application of the doctrine of election; for there is now no doubt that disclaimer may be inferred from circumstances, to the same extent as it formerly operated by matter of record. Anything is now sufficient evidence of a disclaimer, which goes to rebut the presumption of law, that the estate is for the benefit of the person to whom it comes: *Stacey v. Elph (a)*, *Birmingham v. Kirwan (b)*. And certainly, if this be a question of intention, and if intention can be evidenced by conduct, there was in this case the strongest possible evidence that W. Billinghamurst did not intend to enter under the settlement, but under the will. He took the name and arms of Woodroffe, in pursuance of the direction of the will; he

(a) 1 Myl. & K. 195.

(b) 2 Scho. & Lefr. 450.

executed deeds in which he described himself as tenant for life only; he petitioned the Court of Chancery, and in his affidavit described himself as tenant for life only. These are more than mere matters in pais; the last, indeed, is matter quasi of record. All these acts must surely amount to a disclaimer; and a court may look to cases of equitable election, to guide them in cases of legal election.—On this part of the case, he cited *Doe d. Fisher v. Prosser* (a), *Earl of Sussex v. Temple* (b), *Culley v. Doe d. Taylerson* (c).

Lastly, a distinction is at all events to be taken between what may be termed the Billingham and the Maitland estates. With respect to the latter, it is upon the other side to shew that the entry of W. Billingham operated to remit also the co-heiress in tail, Mrs. Walker; or that, by electing to take *under* the will, he acquired the whole estate *against* the will. The latter would be a conclusion wholly inconsistent with legal and equitable principles. And it is to be observed, that these several parties were not in by one act of descent, being the issues of several coparceners; Co. Litt. 164. a.: the entry, therefore, of W. Billingham, even if he had entered as issue in tail, could not have the effect of remitting the issue of the other coparceners.

*Hodgson*, for the defendants in error.—Upon this record there is nothing whatever to shew that W. Billingham, when he entered in 1790, in the character of devisee of George Woodroffe, had any knowledge whatever of his title as tenant in tail under the settlement of 1710; but even if that were otherwise, and there were any grounds for saying that he ought not now to be permitted to set up that title, after having entered and asserted his rights under the will, that is matter, not for the consideration of a court of law, but for the cognizance of a court of equity. If those who

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(a) Cowp. 217. (b) 1 Ld. Raym. 310. (c) 11 Ad. & E. 1008.

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now claim under him, are bound in equity to give effect to the will, the Court of Chancery will decree accordingly; but this Court can look only to the legal rights and relations of the parties. It is said, however, that the doctrine of election is a legal as well as an equitable doctrine. The case of *Birmingham v. Kirwan* (a) appears to be the only case where the doctrine has been recognised and supported at law; and there not to the extent contended for on behalf of the plaintiffs in error. But in the case of a remitter, it must take place nolens volens, because it enures for the benefit, not only of the party who enters, but also of those who claim by subsequent limitations. It has been conceded on the other side, that the estate tail created by the settlement of 1710 was not barred or discontinued by the recovery of 1735, nor by any other act done until the recovery of 1814. The sole question then is, in whom did it subsist? By the operation of the deed of 1735 there were two concurrent titles, one to the base fee created thereby, the other to the estate tail. Until the decision of Lord Holt, in *Machell v. Clarke* (b), an alienation by tenant in tail, by an innocent conveyance, was held only to create an estate for the life of the grantor; but that doctrine was then exploded, and such a conveyance was held to give a base fee defeasible by the mere entry of the issue in tail, there being no breach of the statute de Donis, since the title of the issue in tail, per formam doni, is paramount to the title under the conveyance of the tenant in tail. By the deed-poll of 1735, therefore, an estate in fee simple, determinable on the failure and defeasible by the entry of the issue in tail, vested in George Woodroffe. Now the recovery suffered by him in 1735 could only operate upon the estate tail by way of estoppel; but there are abundant authorities to shew that issue in tail are not affected by the estoppel: see Shep. Touchst. pp. 3, 14, 35, 53, 68, 84.

(a) 2 Scho. & Lefr. 450.

(b) Ld. Raym. 310.

George Woodroffe was no doubt himself estopped from setting aside the conveyance under which he entered and acquired the base fee. Hester Woodroffe did no act to affect it. Upon her death, in 1767, the estate tail descended upon George Woodroffe. If he had been thereupon remitted, his settlements made in 1735 would have been avoided, inasmuch as they could not take effect out of the estate tail, and the base fee would on that supposition be destroyed, and the recovery be void. The principle of law, however, applied, that where a person takes an inconsistent estate with his own consent, he shall not be remitted to his original estate; George Woodroffe, therefore, was not remitted, but upon his death the estoppel under the deed of 1735 was at an end, and the estoppel under the recovery did not bind the issue in tail. On his death the estate tail descended, as to one moiety, upon his nephew, the Rev. W. Billinghamurst, and from him on W. Billinghamurst, afterwards Woodroffe; and the other moiety vested ultimately in Mrs. Maitland. The entry of W. Billinghamurst the younger in 1790 operated ipso facto to destroy the base fee, and to remit him, as to one moiety, to his original estate tail, with all its consequences. And his right of entry was not then barred, for, inasmuch as George Woodroffe had no such right of entry as would enable *him* to defeat the base fee, no available right of entry accrued to any person until his death in 1779. The entry of the issue in tail was then *congeable*, and when it took place in 1790, it operated to remit the party entering, according to the doctrine laid down by Littleton, s. 695. The intention of the party entering cannot prevent or affect the operation of the entry: Com. Dig., Remitter, (B. 3). There may possibly be cases where the party might by an express disclaimer avoid being remitted, but if he enters, and suffers the estate to vest, he is remitted nolens volens. Here, the instant the entry took place, the estate tail was restored; and it will be contended that it was restored equally as to both

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moieties, by the entry of one of the co-heirs in tail. An estate by descent cannot be disclaimed by *ex post facto* acts, like an estate taken under a deed or a will, because an heir at law takes not only for himself, but for those who are entitled after him by force of the entail. The first principle of *election* is, that the party who is put to his election shall know between what things he is to elect: but here there is nothing whatever to shew that W. Woodroffe was cognisant of his rights as heir in tail. But it has been argued, that inasmuch as George Woodroffe had the reversion in fee immediately expectant on the determination of the estate tail in his mother, the base fee merged absolutely on her death in that reversion. But that was not so, because there was no assurance made which could bar the issue; the base fee could only merge, if at all, subject to the right of the issue in tail to enter and avoid it: therefore, the estate tail being still in existence at the time of the recovery suffered by W. Woodroffe in 1814, he acquired by the operation of that recovery a good title in fee simple to one moiety of the estate. With respect to the argument which has been advanced, that the doctrine of remitter does not apply where the party enters under the Statute of Uses, the authorities cited in the judgment of the Court below shew that it cannot be supported. But further, in order that the Statute of Uses may apply, there must be a seisin for some period, however short, in a feoffee or releasee to uses. In the case of a will, the seisin is executed with reference, not to the Statute of Uses, but to the Statute of Wills. In truth, the will of George Woodroffe was inoperative altogether, and the estate tail subsisted, neither barred nor discontinued, until the recoveries of 1814 and 1818.

With respect to the other moiety of the estate, the entry of W. Woodroffe in 1790, must be taken to be an entry as well on behalf of Mrs. Walker, his co-heiress, as of himself. Before the 3 & 4 Will. 4, c. 27, the entry of one

parcener vested the estate of all. The fact of his having been in possession adverse to her for twenty years is immaterial; he was not bound to set up the Statute of Limitations against her. When the recovery of 1818 was suffered, the title to the whole estate was in W. Woodroffe and Mrs Maitland; W. Woodroffe had power to convey an estate of freehold to a tenant, and Mrs. Maitland being vouched, came in and completed the title.

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*Humphry*, in reply.—It cannot certainly be contended that the deed poll of 1735 itself created a discontinuance; but when, upon the death of Hester Woodroffe in 1767, the base fee came into contact with the immediate reversion, a merger occurred, the right of entry was turned into a right of action, and a discontinuance took place. The effect of the argument on the other side is, that a right of entry, the exercise of which is for a time prevented by an estoppel, is the same thing as no right of entry at all. If a right of entry existed at all, the Statute of Limitations began to run upon it from the death of Hester, and so the actual entry was out of time. The position, in Com. Dig. Remitter, (B., 3), as to remitter being nolens volens, and not capable of waiver, is that it is so “for the benefit of him in remainder, otherwise not;” 2 Roll. 422, pl. 40. Now in this case the effect of the remitter was to prejudice the remainder-man, and not to benefit him. With respect to the point as to the Statute of Uses, the authorities shewing that a party who takes under the Statute of Uses is not remitted, are collected in Com. Dig. Remitter, (C. 6). Again, according to the law as stated by *Patteson*, J., in *Doe d. Cooper v. Finch*, the issue in tail had a right of election whether he would be in of his remitter or not; and as W. Woodroffe entered under the will, he is bound by it.

In Michaelmas Vacation, 1845, the Court intimated that they wished to hear a further argument upon the point,

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whether, assuming that W. Woodroffe was remitted, as tenant in tail, to one moiety of the estate, the lessors of the plaintiff are shewn on this special verdict to be entitled to the other moiety.

The case was accordingly further argued, in last Hilary Vacation, (February 6)(a), by

*Humphry*, for the plaintiff in error.—The question which the Court desires to have further argued is in effect this—whether W. Billingham, afterwards Woodroffe, the tenant for life under the will of G. Woodroffe, acquired a fee simple in the other moiety of this estate. That involves two points: first, whether the remitter of W. Woodroffe to his own moiety worked a remitter to his co-heir of the other moiety; and secondly, if that was not so, whether the possession of W. Woodroffe, being adverse to his co-heiress in tail, Mrs. Walker, operated so as to revest in him and his heirs the whole of the estate tail for his own benefit, or whether it did not confirm the title under which he continued in possession, namely, the base fee, and, as a portion of that base fee, the estate for life and remainder over expectant thereon, given by the will of G. Woodroffe.

Numerous acts on the part of W. Woodroffe appear on the special verdict, which amount to an estoppel to his claiming under any other title than that of the will. Between 1779, when by the separation of the two moieties the title became adverse, and 1790, when the entry took place which worked the remitter, there were descents of both moieties. The descents which thus occurred so severed the heirship, that the co-heirs could not have joined in a real action: Co. Litt. 164. a. It follows, that the remitter of one did not operate to remit the other.

(a) Before Lord *Denman*, C. J., *Patteson*, J., *Coleridge*, J., *Coltman*, J., *Maule*, J., and *Erle*, J.

Remitter is a doctrine of necessity, and takes place only when the party has no other remedy. Littleton, giving the reason for a remitter, says (s. 661)—“A principal cause why such heir in the cases aforesaid, and other like cases, shall be said in his remitter, is, for that there is not any person against whom he may sue his writ of formedon. For against himself he cannot sue, and he cannot sue against any other, for none other is tenant of the freehold; and for this cause the law doth adjudge him in his remitter, scilicet, in such plight as if he had lawfully recovered the same land against another.” Here one co-heir had a remedy against the other. It is not like the case of an entry on a disseisor, or on a vacant possession. By the will of George Woodroffe, the base fee (which is an estate subject to all rights of disposition) was disposed of to one for life, and then over; the tenant for life entered under the will, that is, under the base fee—a rightful but defeasible title. There was no necessity, in such a case, for the operation of the doctrine of remitter as to the moiety of his co-heiress in tail, for that co-heiress had the same rights and remedies as other persons. She might have asserted the right by a simple entry, without more. Further, the *circumstances* under which the entry of William Billingham, afterwards Woodroffe, took place in 1790, were not such as that his entry and possession worked a remitter as to the other moiety of the estate. There may be a special entry for a particular purpose, and claiming a particular right, which will not have the effect of revesting the title of the co-heir. In *Vin. Abr.*, Entry, pl. 1, it is said, “If lands descend to two parceners, and a stranger abates, and after one co-parcener enters into the whole to her own use, this shall not settle any possession in the other, but all the estate shall be in herself by the special entry.” And in *Co. Litt.* 243. b., “Here it appeareth, that when the one coparcener doth specially enter, claiming the whole land, and taking the whole pro-

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fits, that she gains the one moiety, viz. of her sister by abatement, and yet her dying seised shall not take away the entry of her sister; whereas, when one coparcener enters generally, and taketh the profits, this shall be accounted in law the entry of them both, and no divesting of the moiety of her sister." This distinction is recognised by *Doe d. Barrett v. Keen* (a), and *Doe d. Gill v. Pearson* (b). Now, in the present case, the entry of W. Woodroffe, as all the acts done by him plainly shew, was an entry for the special purpose of claiming the entirety of the estate, under the devise of it in the will of George Woodroffe, and therefore it did not operate to re-vest the title of the co-heiress of the moiety.

Secondly, assuming that there was no *remitter* as to the moiety of Mrs. Walker, then, if W. Woodroffe acquired a title to the other moiety by adverse possession, he and those claiming through him are estopped to say that he did not acquire it in respect of the estate given by the will. There may be an estoppel by *recital*: *Nash v. Turner* (c), and other authorities cited in the note to Smith's Leading Cases, vol. 2, p. 456. That doctrine was admitted in *Right d. Jeffreys v. Bucknall* (d), although, under the circumstances of that case, it was held that an estoppel was not in fact worked. Had W. Woodroffe entered upon the other moiety of the estate, not by wrong, not in the character of a disseisor, but in respect of the estate for life which had by the will of George been carved out of the pre-existing base fee, which continued until the base fee was destroyed by the recovery, and was liable to be confirmed by any operation of the Statute of Limitations, the bar of the issue in tail by lapse of time would prevent the base fee from being defeated. When the law has by lapse of time rendered the base fee indefeasible, the party

(a) 7 T. R. 386.

(b) 6 East, 173.

(c) 1 Esp. 217.

(d) 2 B. & Adol. 278. See, on this point, *Carpenter v. Butler*, 8 M. & W. 209.

claiming a tenancy for life carved out of it cannot be allowed to say that it is defeated. The effect, therefore, of the continuance in possession of W. Woodroffe to the end of twenty years from the period when the adverse possession commenced in 1779 was, not to defeat the base fee, or alter the nature of the estate, which, though a defeasible, was not a wrongful estate, but, on the contrary, to bar the claim of the issue in tail, and so to render the base fee indefeasible, and to confirm the estates of all the parties entitled under the successive limitations to which the base fee was subjected by the will. In Co. Litt. 267. b., it is said: "By this it appeareth, that as a release made of a right to him in reversion or remainder, shall aid and benefit him that hath the particular estate for years, life, or estate tail, so a release of a right made to a particular tenant for life, or in tail, shall aid and benefit him or them in the remainder." And if so, this indefeasible base fee could not be affected by the recovery. When tenant in tail is barred of his real action, he cannot gain the fee by the feigned action of a recovery. See the opinion in Fearn's Posthumous Works, pp. 442—444.

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*Hodgson, contra.*—The entry of one coparcener, unexplained, enures to the benefit of the others. With respect to the distinction taken between general and special entry, it is not found by the special verdict that the entry of W. Woodroffe was into one moiety only, and that cannot be inferred. The argument on the other side is, that he actually ousted Mrs. Maitland from the other moiety, and held the entirety of the estate in fee. But this argument cannot be maintained. The claim of W. Woodroffe was not adverse to her; she had a right to an estate tail, and by coming in and being vouched, she confirmed the estate of which he was in possession. However imperfect the right of W. Woodroffe was, it was competent to her to confirm it, and by so doing to avoid the base fee. Then the descents cast

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between 1779 and 1790 are relied on as affecting the title; but they only created a greater variety of persons entitled; they did not toll the entry. The estate tail was never barred from the period of its creation in 1710. The recovery of 1735, being suffered by one who was then a mere stranger to the estate, could only operate by estoppel against him and in favour of some person who took adversely to the tenant in tail. If the limitations of the marriage settlement of George Woodroffe had taken effect, there might have been persons in whose favour the estoppel might operate; but they failed; the estate tail, therefore, never was without an owner in possession, from 1710 down to the recoveries in 1814 and 1818. Notwithstanding the recovery of 1735, George Woodroffe continued tenant in tail, and died in that character; and in 1790, W. Billinghurst entered as tenant in tail, and being a coparcener, his entry enured to the benefit of the other coparcener. But even if he had acquired a fee adversely to Mrs. Maitland, he was fully at liberty to abandon that title in 1818, and to vouch her in the recovery.

*Humphry* was heard in reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

PATTESON, J.—It appears, by the special verdict in this case, that George Woodroffe, being seised of certain lands in fee simple, by a deed dated January 6th, 1710, settled the same to various uses long since expired, and subject thereto to the use of Robert Woodroffe (his brother) and Hester his wife, and the heirs of their bodies issuing, and for default of such issue, to Robert Woodroffe in fee. Robert Woodroffe died in the lifetime of George Woodroffe, the settlor, leaving by his wife Hester one son, George Woodroffe, and two daughters, Lettice Woodroffe, afterwards

Billinghurst, and Hester Woodroffe, afterwards Caverley. George Woodroffe, the settlor, died in 1713. Hester Woodroffe died in 1767, and on her death the estate tail would have descended in regular course to her son George, and on his death in 1779 without issue, the estate tail would have descended in moieties, viz. one moiety would have descended to William Billinghurst, the only son of Lettice Billinghurst, and on his death in 1790 to his eldest son William, who assumed the name of Woodroffe; and on the death of this William Woodroffe in 1824 without issue, to his brother George, who also assumed the name of Woodroffe, and is the plaintiff in error. The other moiety would in like manner have descended, on the death of George Woodroffe, the nephew of the settlor, to Hester Caverley, and on her death in 1784 to her only daughter Ann Walker, and on her death in 1797 to her only daughter Jane, who married first Dalhousie Watherstone, and afterwards William Mordant Maitland.

It will be convenient in this place to advert to some of the deeds which have been executed by the parties successively in possession of the estate. In September, 1735, Hester Woodroffe, being then tenant in tail in possession, executed a deed poll, which operated as a covenant to stand seised, the effect of which was to pass a base fee to George Woodroffe her son, who afterwards, in the same year, and in the life of Hester, suffered a recovery to the use of himself in fee. George Woodroffe dying in 1779, by his last will devised the lands in dispute to trustees and their heirs, in trust to pay an annuity of £200 a-year to his nephew William Billinghurst, and subject thereto to his great-nephew William Billinghurst (afterwards Woodroffe) for life, with remainder to the trustees to preserve contingent remainders, with remainder to the first and other sons of William Billinghurst (afterwards Woodroffe) in tail male; and in default of such issue, to the use of George Woodroffe (the plaintiff in error) for life, with other limitations

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not material to be stated. The devisees in trust of George Woodroffe the testator entered into possession, and so continued till the death of William Billinghamurst the nephew of the devisor, and until about October, 1790, when they gave possession to the great-nephew, William Billinghamurst, (afterwards Woodroffe), who was then of age. The said William Woodroffe, or parties claiming under him, continued in possession of the rents and profits of the entirety of the premises in question, and of other estates devised by the will of George Woodroffe the devisor, from the time when he came of age, in October 1790, up to the time of his death in 1824.

It was agreed by the counsel on both sides, that the effect of the deed poll of Hester Woodroffe of 1735 was to pass a base fee to her son George Woodroffe, the devisor, but it was contended by Mr. *Humphry*, for the plaintiff in error, that, as George Woodroffe the devisor was heir at law of Robert Woodroffe, and as such entitled, under the settlement of January, 1710, to the reversion in fee expectant on the determination of the estates tail created by that deed, the base fee merged in the reversion in fee. No authority was cited in support of this position, but it was rested on a supposed analogy to the case where a tenant in tail, with an immediate reversion in fee, levies a fine, the operation of which is commonly said to be to merge the estate tail, and bring the reversion into immediate possession (*a*). But it seems to us that the cases are not parallel; for, in the case of a fine, the estate tail is barred by force of the statute of fines; but in this case it is preserved by the statute de donis, and still subsists in point of right, antecedent to the reversion in fee; and as long as that intermediate estate subsists, the doctrine of merger cannot apply. But it was further contended, that, if the base fee were not merged in the reversion, still the base fee

(*a*) Cruise on Fines, p. 274; *Symonds v. Cudmore*, 4 Mod. 1.

would be sufficient to support the devises of the will of George Woodroffe the devisor, as long as it continued to exist, and it was argued that the base fee still continued to exist. It was agreed on both sides, and the law, we think, is clear, that there was no remitter to George Woodroffe the devisor, the recovery suffered by him having effectually estopped him, and prevented him from being remitted to his title under the estate tail; but it was contended, by the plaintiff in error, that there was no remitter to William Woodroffe, the great-nephew of the devisor, on several grounds: first, on the ground that William Woodroffe took an estate by virtue of the Statute of Uses, and consequently could have no other estate in the land than what he had in the use, agreeably to the rule established in *Amy Townsend's case* (a); and a dictum of Mr. Justice Paterson, in *Doe v. Cooper* (b), to the same effect, was cited. But those cases differ from the present, as the estates tail in those cases had been discontinued, and the issue in tail had consequently no right of entry. In the present case, the estate tail had not been discontinued, and it was upon this difference that the judgment of the Court below proceeded, in conformity with an anonymous case in 3 Leonard, 93, which was decided upon the same difference, and in conformity also with Coke's Commentary on Litt., s. 693, where the same difference is taken. The counsel for the plaintiff in error cited *Vavasor's case* (c), as being inconsistent with the decision of the Court below on this point. In that case, Nicholas Ellia, being seised of the manor of Woodhall, leased it to William Vavasor and Elizabeth his wife, for the life of the wife, with remainder to the right heirs of the husband. The husband made a feoffment in fee to the use of himself and his wife for their lives, remainder to the right heirs of the husband. The husband died, the wife held the land, and did waste in a park, parcel

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(a) Plowd. 111.

(b) 4 B. &amp; Adol. 305.

(c) 2 Leon. 223.

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of the manor. "It was moved to the Court if the writ of waste should suppose that the wife held ex dimissione Nicolai Ellis, or ex dimissione of her husband. It was the opinion of the Court, that upon this matter the writ should be general, viz. that she held ex hereditate J. S., &c., without saying more, either ex dimissione hujus, vel illius; for she is not in by the lessor, nor by the feoffees, but by the Statute of Uses, and therefore the writ shall be ex hereditate. It was also the opinion of the justices, that the wife here is not remitted, but that she should be in according to the terms of the feoffment."

This case cannot be considered as a decision on the point of remitter, being but an incidental discussion upon a motion made to ascertain the opinion of the Court on the proper form of making out the writ. If, however, the case is to be looked upon as a decision on the point, it is at variance with *Hawtrey's case* (a), and must be considered as overruled by the subsequent case in 3 Leon. 93, and the case of *Duncombe v. Wingfield* (b). But, secondly, it was contended, that there was no remitter in this case, because remitter was said to be subject to election, and in this case it was said that William Woodroffe had entered claiming under the devises contained in the will of George Woodroffe the testator, and must be considered as having elected to take under the will, and to have waived his claim to the estate tail. No authority was cited to shew that a party can waive an estate to which he would be remitted, where the remitter would enure to the benefit of others as well as himself. Littleton's authority, s. 695, is express, that a disclaimer in pais is of no avail, and the reasons assigned by Dodderidge, as stated in the note in Dyer, 351, explain satisfactorily the grounds of this rule of law. In that case, land in socage tenure was given to a man and his wife in tail, with remainder to the heirs of the husband in fee;

(a) Dyer, 191 b.

(b) Hob. 254.

they have issue; the husband levied a fine, with proclamations, to his own use, and then by will devised the land to his wife for life, and the remainder to a stranger in fee, with a condition to pay a rent out of the land annually, with a clause of distress. He died, the wife entered, claiming an estate for life, paid the rent according to the will, and then died. The question arose, whether the issue in tail or the remainderman was entitled to the land. The Court held that the tenant in tail was barred, for that his mother had waived the estate tail; and even if she had not, the conveyance of the estate tail must necessarily be made as heir of the body of his father as well as his mother, so that the fine with proclamations levied by the father barred the entail. In the margin of the case is this note:—The wife in this case had an election, whether she would be in of her remitter or not; because, if she had been remitted, this would not be beneficial to any other; because the fine of the baron barred the issue and all others. This reason was given by Dodderidge.—We agree, therefore, with the Court below in thinking that the disclaimer was unavailing to prevent the remitter. But it was further objected, that there could be no remitter in this case to William Woodroffe, on the ground that his entry was barred by the Statute of Limitations. The answer given in the Court below to this objection appears to us to be satisfactory, for we agree with that Court that the right of entry in this case must be considered as having first accrued on the death of George Woodroffe, the testator, in 1779; for up to that time there never was any available right of entry in any person, and it could not be the intention of the statute to take away the right of entry, unless an available right of entry had descended on some person who had neglected to take advantage of it, for which *Peniston's case* (a) is an authority. The entry, therefore, made by

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(a) Noy, 46.



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William Woodroffe in 1790 was within the time limited by statute. It appears to us, therefore, that after William Woodroffe had entered into possession under the defeasible title derived under his uncle's will, having at that time a right of entry into one undivided moiety of the land as heir in tail of that moiety, he must be considered as having been remitted to his better estate as to that moiety, and as to that moiety a good title is deduced to the lessors of the plaintiff below. But it is next to be considered what is the effect of the state of circumstances appearing on the special verdict upon the other moiety of the estate, to which Mrs. Walker at that time, namely, in 1790, had a claim as heir in tail.

It was contended, on behalf of the defendants in error, that William Woodroffe and Ann Walker being parceners, and William Woodroffe being remitted to his better estate, Ann Walker was remitted also. No authority was cited to shew, that where a defeasible estate in lands is cast upon a man who has in him an elder and better title to a moiety, the remitter of him to his elder title, as to the one moiety, operates as a remitter to another party entitled to the other moiety as coparcener with him. If we consider the matter independently of authority, there appears no ground for holding that there is a remitter in such a case. It is said in Littleton, s. 659, that a remitter takes place when a man has two titles to lands and tenements, one a more ancient title, and another a more latter title; and if he come to the land by a latter title, the law will adjudge him to be in by force of the elder title, because the elder title is the more sure and more worthy title.—In the present case there is no such concurrence of titles; Mrs. Walker having no defeasible estate cast upon her, but simply a title to an estate tail by descent. It is said, with reference to estates discontinued (a), that the principal cause why the heir in such

(a) Littleton, s. 661.

cases shall be said to be in his remitter, is, for that there is not any person against whom he may sue his writ of formedon: for against himself he cannot sue, and he cannot sue against any other, for none other is tenant of the freehold. But no such reason for remitter exists in the present case, since Mrs. Walker might have asserted her right to the estate by a simple entry without more, so that the reason for remitter seems to fail entirely. It may be urged, that, after the entry of William Woodroffe in this case, Mrs. Walker ought to be considered as being actually in possession of her moiety, for which the case of *Smales v. Dale* (a) may be cited. In that case, William Watson was seised of the lands in question, and had issue Allen Watson and Anne Watson by one wife, and William Watson by another, and devised the land, being holden in knight's service of the Queen, to his wife during widowhood, the remainder to William the younger son, and died, and his wife entered into all the lands. Allen made no actual entry into the lands, but died without issue; and the question was, whether the entry of the widow into the lands did work to an actual entry to Allen the heir for his third part, whereof he was tenant in common with the widow, the devise as to that third part being void. The entry in that case was made by the widow generally, but the Court did not confine itself to what was strictly necessary to the decision of the case; for it was said that "the entry of one tenant in common might be in three manners: either in the name of herself, or her fellow, (which were most clear); or generally, (as this case is), which shall be always taken according to right, as being under construction of law, and therefore ever construed lawful; or lastly, entry claiming all expressly, which yet cannot dispossess her fellow, for her possession is over all lawful, as well before such claim

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(a) Hebart, 120.

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as after; so that there is no possession altered by such claim, and then a sole claim without more can never change the possession, and without a change of possession it remains as before; and therefore a copartner, joint tenant, or tenant in common, can never be disseised by his fellow but by an actual ouster." The Court held, on these grounds, that the entry of the widow operated as an actual entry by Allen, so as to exclude his brother of the half-blood. The law is, however, laid down differently in Co. Lit. 373. b., where it is said, "Here it is to be understood, that when one coparcener doth enter into the whole, this doth not divest the estate which descends by the law to the other, unless she that doth enter claimeth the whole, and taketh the profits of the whole, for that shall divest the freehold in law of the other parcener." But even supposing the positions laid down in the case of *Smales v. Dale* to be correct to the full extent to which they are laid down, the relations of coparceners to each other have been varied by the statute 3 & 4 Will. 4, c. 27, s. 12. By that section it is enacted, that, where any one or more of several persons entitled to any lands as coparceners, &c., shall have been in possession of the entirety, or more than his or their undivided share or shares of such land, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of such land, such possession shall not be deemed to have been the possession of such last-mentioned person or persons, or any of them. This statute has been decided, in the case of *Culley v. Doe d. Taylerson (a)*, to have a relation back, so far as relates to the objects of the act, and to have the effect of making their possessions separate from the time when they first became coparceners, joint tenants, or tenants in common. Since the passing of that statute,

(a) 11 Ad. & El. 1016.

therefore, the possession of the land by one coparcener cannot be considered as the possession of his coparcener; nor, consequently, can the entry of one have the effect of vesting the possession in the other. It remains to be considered, whether William Woodroffe, by his entry and continuance in possession until the right of entry of Mrs. Walker and her descendants was barred, is to be deemed to have gained a fee simple by wrong to his own use. It may be admitted, that if a party enters on land by disseisin or abatement, and holds it adversely to the party entitled for a sufficient length of time to bar the right, he will have gained an indefeasible estate in fee simple by wrong to his own use, or to the use of another, if the disseisin were made to the use of another, for which see Littleton, s. 278, where it is said, "If two or three, &c. disseise another of any lands or tenements to their own use, then the disseisors are joint tenants. But if they disseise another to the use of one of them, then they are not joint tenants; but he to whose use the disseisin is made is sole tenant, and the others have nothing in the tenancy, but are called coadjutors to the disseisin." The present case, however, is not to be likened to a case of disseisin, for William Woodroffe, when he entered as devisee under the will of George Woodroffe, entered under a title which, though defeasible, was good until it was defeated. The nature of the estate which George Woodroffe the testator possessed, and which he devised by his will, is explained in the case of *Machell v. Clarke* (a), where it is said, "If tenant in tail conveys the land entailed by bargain and sale, lease and release, covenant to stand seised to the use of another, and dies, a base fee passes by the conveyance, and the estate continues, until it is avoided by the issue in tail by entry." The base fee, though defeasible, is not to be considered as a wrongful

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(a) 2 Lord Raym. 782.

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estate, and it has all the incidents of a rightful estate until defeated. If the issue in tail neglects to make an entry so long that his right of entry is gone, this continuance of possession by parties claiming under the base fee cannot alter the nature of the estate; but we think its effect is to bar the claim of the issue in tail, and so render the base fee indefeasible, and thereby to confirm and corroborate the estates of those who, under the limitations to which the base fee is subject, are entitled to successive portions of the fee, not to extinguish or vary those limitations.

The result of our opinion therefore is, that, as far as regards the moiety of the estate which Mrs. Walker was at one time entitled to have recovered, the base fee was never defeated, and, as to that moiety, that the judgment of the Court below ought to be reversed, and judgment given for the plaintiff in error; but, as to the other moiety, that the judgment of the Court below ought to be affirmed.

Judgment accordingly.

## MEMORANDA.

**E**ARLY in this Vacation, Lord *Lyndhurst* resigned the Great Seal, which was delivered, for the second time, to the Right Hon. Lord *Cottenham*, with the title of *Lord Chancellor*.

Sir *Frederick Thesiger* and Sir *Fitzroy Kelly* resigned their offices of Attorney-General and Solicitor-General to the Queen, and were respectively succeeded by Sir *Thomas Wilde*, Knt., and *John Jervis*, Esq. (Pat. Prec.)

On the 6th of July, Lord Chief Justice *Tindal* died, after a few days' illness.

The Attorney-General (Sir *Thomas Wilde*) was appointed Lord Chief Justice of the Court of Common Pleas in his room :—and thereupon

Mr. *Jervis* succeeded to the office of Attorney-General, and *David Dundas*, Esq., one of her Majesty's Counsel, was appointed the Solicitor-General. Both were subsequently knighted.

Mr. Serjeant *Talfourd* and Mr. Serjeant *Manning* were appointed her Majesty's Serjeants.

On the 14th of September, Mr. Justice *Williams* died suddenly, at his seat in Suffolk.

Mr. Justice *Erle* was thereupon transferred from the bench of the Court of Common Pleas to that of the Court of Queen's Bench: and *Edward Vaughan Williams*, of

1846.

Lincoln's Inn, Esq., was appointed a Judge of the Court of Common Pleas in his room. He was first called to the degree of the coif, and gave rings with the motto "*Legum servi ut liberi:*" and he afterwards received the honour of Knighthood.

Shortly before the commencement of Michaelmas Term, *Charles Buller*, of Lincoln's Inn, Esq., was appointed one of her Majesty's Counsel.

END OF TRINITY VACATION.

# I N D E X

TO THE

## P R I N C I P A L   M A T T E R S.

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### ACCORD AND SATISFAC- TION.

#### *Discharge of Debt by Acceptance of Negotiable Security for smaller Amount.*

To an action for £1000 money had and received, and £1000 due on an account stated, the defendant pleaded, as to £500, parcel of the sum in these two counts mentioned, that the account was stated of and concerning the said sum of £500, parcel &c., in the first count mentioned, and no other; that, after the said causes of action arose, the plaintiff commenced, in the Tolzey Court of Bristol, an action of debt for the recovery of the said sums of £500 and £500; that the defendant disputed the said supposed debt, and denied that he owed or was liable to pay it, or that the plaintiff could recover it; and thereupon, to terminate the said dispute and difference, and the claim and demand of the plaintiff in the said action, and finally to determine the same, the plaintiff and defendant agreed that the said action should be settled by the defendant making and delivering to the plaintiff three promissory notes, for payment to the plaintiff or order of the sums of £125, £125, and £50, and that the plaintiff should accept

and receive the same in satisfaction and discharge of the said sums of £500 and £500, and all damages and costs, and that the plaintiff should discontinue the said action. Averment, that the defendant made and delivered to the plaintiff the said three promissory notes, and that the plaintiff accepted the same in full satisfaction and discharge of the said sums of £500 and £500, and the damages and costs, &c. The replication denied the making of the agreement stated in the plea.

The defendant proved, in support of this plea, that the plaintiff had sued him in the Tolzey Court for the £500, when it was agreed between them that the defendant should give, in settlement of the action, three promissory notes, two for £125 each, and one for £50, payable to the plaintiff or his order, which he did; and the following memorandum was then endorsed by the plaintiff's attorney on the writ served in that action:—"This action is settled by the defendant giving three promissory notes, viz. one at three months, £125; one at four months, £125; and one at twelve months, £50; upon payment of which, I undertake to deliver to F. S., Esq., [the defendant's attorney], the several papers in my possession in refer-



## 798 ACTION ON THE CASE.

ence to this action.—J. P. H.” The defendant paid the two notes for £125 each when due, but refused payment of the note for £50 :—

*Held*, first, that the above plea was a good answer to the action in point of law ; for that the acceptance of a negotiable security may be in law a satisfaction of a debt of a greater amount.

Secondly, that the plea was proved by the *giving* of the promissory notes in pursuance of the agreement, and that it was not necessary to shew that they were all *paid* at maturity. *Sibre v. Tripp*, 23

## ACTION ON THE CASE.

*Against Wharfinger for Negligence in mooring Vessels — Allegation of duty.*

Declaration in case stated, that the defendant was possessed of a wharf for the loading and unloading of vessels, on the banks of the Thames, near which there was certain woodwork, before then placed by the defendant and then being upon the bottom of the river, over which at certain states of the tide the vessel of the plaintiff thereafter mentioned would float, but, at others, not ; that while the defendant was so possessed of the wharf, the plaintiff was possessed of a vessel then being, by the sufferance and permission of the defendant at and alongside the said wharf, for reward to the defendant in that behalf ; and the defendant then had the management and control of the said wharf, and the mooring and stationing of vessels at and near the same, while they were at the said wharf, for the purpose of using the same. Breach, that the defendant unskilfully and negligently placed, moored, and stationed the plaintiff's vessel in the part of the river near the

## ARBITRATION.

said wharf, and over the said woodwork, and unskilfully and negligently detained the vessel there for a long time, until, on the natural fall of the tide, she fell and lodged against the said woodwork, and was damaged thereby :—*Held*, on motion in arrest of judgment, that this count sufficiently stated a duty in the defendant safely to moor and station the plaintiff's vessel, and a breach of that duty. *Wood v. Curling*, 626

## AFFIDAVIT.

*Intitling.*

Where the writ of summons described the defendant as “ Frederick C. Prosser,” an affidavit sworn by him in support of a rule for setting aside the judgment for irregularity, the title of which described him as “ Frederick Coulston Prosser,” (his real name), was held irregular. *Sims v. Prosser*, 151

## AGREEMENT.

*See* LEASE, (1).  
STAMP, (2).

## ARBITRATION.

*See* PRACTICE, (8).  
STAMP, (1).

### (1). *Excess of Authority by Arbitrator.*

Three causes were referred to arbitration, in one of which the infant sued by his next friend ; the other two being actions in which he was the substantial, though not the nominal plaintiff. The costs of the causes were to abide the event, and the costs of the reference and award were to be in the discretion of the arbitrator. The arbitrator decided all the causes in favour of the defendant, and or-

dered that the *infant* should pay all the costs of the reference and award:—*Held*, that this was no excess of authority. *Proudfoot v. Boyle*, 198

(2). *Power of Arbitrator to certify for Special Jury.*

An arbitrator, to whom a cause is referred with all the powers of a judge at Nisi Prius, cannot give a certificate for the costs of a special jury, after he has made and published his award, without providing for them therein. *Geeves v. Gorton*, 186

(3). *Statement by Arbitrator of Special Case, after Death of Party.*

Where, by order of Nisi Prius, a cause is referred to a barrister to state a special case, it is no ground for setting aside the case that it is stated after the death of one of the parties. *James v. Crane*, 379

## ATTACHMENT.

A rule for an attachment for non-payment of costs pursuant to the Master's allocatur and rule of court, was refused, on the ground of a defect in the service of the power of attorney. A proper service was afterwards effected, and a fresh demand of the costs was made, and payment again refused:—*Held*, that a fresh rule might then be obtained for the attachment. *Dixon v. Oliphant*, 152

## ATTORNEY.

See PLEADING, I. (1).

(1). *Summary Enforcement of Undertaking by,*

The attorney for a defendant in a cause in this Court signed an undertaking, whereby, in consideration of

the plaintiff's agreeing to suspend execution on the judgment, he undertook to make an arrangement with him respecting the payment of the debt and costs, prior to the defendant's being discharged from prison on other detainers; or, in the event of the plaintiff's not agreeing to the terms offered, to inform him in sufficient time of the defendant's intended discharge, so that the plaintiff might not be deprived of his power of lodging a detainer against him:—*Held*, that this was not such an undertaking as the Court could enforce summarily, inasmuch as they could not measure the damages sustained by the non-performance of it.

*Semble*, the Court has power to enforce the performance by an attorney of an undertaking given by him as attorney in a cause in this Court, though he be not an attorney on the roll of this Court. *Thompson v. Gordon*, 610

(2). *Bill, form of.*

An attorney's bill of costs for common-law business, delivered under the stat. 6 & 7 Vict. c. 73, must shew in what court the business was done. *Engleheart v. Moore*, 548

## AUCTION.

*Puffing.*

Where a sale by auction is advertised or stated by the auctioneer to be "without reserve," the employment by the vendor of a puffer to bid for him, without notice, renders the sale void, and entitles the purchaser to recover back his deposit from the auctioneer. *Thornett v. Haines*, 367

## BAIL.

*Justification of—Qualification by Railway Shares.*

Shares in a railway company in ac-

tual operation are property in respect of which bail may justify. *Pierpoint v. Brewer*, 201

## BANKRUPTCY.

See LEASE, (3).

(1). *Opening Fiat, what is—Substitution of New Petitioning Creditor.*

The term "opening of the fiat," in the Bankruptcy Act, 5 & 6 Vict. c. 122, s. 4, does not mean the reading of the fiat in court, but the aduction of all the proof necessary to enable the Court to adjudge the party a bankrupt. The Court of Bankruptcy may, therefore, under that section, admit another creditor to prosecute the fiat, after an unsuccessful attempt to prove his debt by the original petitioning creditor.

And the creditor so admitted to prosecute the fiat is not required to prove the debt of the original petitioning creditor, but the Court ought to adjudge the party a bankrupt on proof of the debt of the prosecuting creditor, and of the trading and act of bankruptcy: and such adjudication will be valid, although the original petitioning creditor's debt was in fact insufficient, and although no order for the substitution of a fresh petitioning creditor's debt be made by the Lord Chancellor, under the 6 Geo. 4, c. 16, s. 18. *Kynaston v. Davis*, 705

(2). *Reputed Ownership.*

A. bought goods from B., with the fraudulent intention of never paying for them, and kept them until his bankruptcy:—*Held*, that they did not pass to A.'s assignees under the fiat, as having been in his possession, order, and disposition as the reputed owner

## BILL OF EXCHANGE.

thereof, with the consent of the true owner. *Load v. Green*, 216

(3). *Measure of Damages in Action by Assignees.*

B., being indebted to the defendant in the sum of £500 for the price of goods sold to him, and being pressed for part payment of the debt, handed to the defendant a bill of exchange, drawn by himself, for £600, which the defendant agreed to discount, on the terms of retaining to his own use the sum of £100 and the discount, and paying over the difference to B.: he, however, retained the bill, and paid no part of the proceeds over to B. B. shortly afterwards became bankrupt:—*Held*, that his assignees were entitled to recover from the defendant the full amount of the bill, minus the £100, and such discount as the jury should find to be receivable by the defendant. *Alder v. Keighley*, 117

## BILL OF EXCHANGE.

See PLEADING, IV. (1).

(1). *Notice of Dishonour.*

A bill of exchange was drawn by H., indorsed by him to B., and by B. to C., in whose hands it was dishonoured. C.'s attorney gave notice of dishonour in due time to A., but stated therein, by mistake, that he was directed by B. (from whom he had no authority) to apply for payment of the bill:—*Held*, that the notice of dishonour was sufficient, notwithstanding this misrepresentation, the only effect of which was to give A. every defence against C. that he would have had if the notice had really been given by B. *Harrison v. Samuel Ruscoe*, 231

(2). *Title by Re-indorsement to former Indorser to Defendant—Circuity of Action—Pleading.*

Assumpsit by indorseees against indorser of a bill of exchange, drawn by W. & Co. on H., indorsed by W. & Co. to the defendant, and by the defendant to the plaintiff.

Plea, that W. & Co. are the plaintiffs, and no other persons; that the plaintiffs and no other persons are the makers of the bill, and the persons to whose order it was payable, and the persons who indorsed to the defendant, and who are liable to him as such indorsers, in the event of payment of the bill by him.

Replication, that, at the time of the drawing of the bill, H. was indebted to the plaintiffs in the amount of the bill, and thereupon it was agreed between the plaintiffs and H., that, in consideration that H. would procure the defendant to indorse and become surety as indorsee to the plaintiffs of the bill, they would give time to H. for payment of the debt: that the plaintiffs in pursuance of this agreement, drew and indorsed the bill as in the declaration mentioned, and the defendant, for the accommodation of H., indorsed it to the plaintiffs, with the intent of thereby becoming surety as indorser to the plaintiffs of the bill; that H., in further pursuance of the agreement, delivered the bill so indorsed to the plaintiffs, and the plaintiffs gave time to H., and that no part of the said debt has been paid to them:—*Held*, first, that the facts disclosed in the replication shewed a sufficient title in the plaintiffs to sue the defendant on his indorsement to them, notwithstanding their previous indorsement to him. Secondly, that the replication shewed a sufficient consideration for the defendant's promise to pay the plaintiffs the amount of the bill. And thirdly, that it was

not a departure from the declaration. *Wilders v. Stevens*, 208

(3). *Declaration—Description of Party by Christian Name.*

In a declaration on a bill of exchange it is informal to describe any of the parties to the bill by the initials only of his christian name, without shewing that he is so described in the bill itself.

In a declaration containing several counts on different bills of exchange, each count, after describing the bill, referred to it as "the said" bill of exchange:—*Held*, sufficiently certain, even on special demurrer; for that the words "the said" ought to be referred to the last antecedent. *Esdaille v. Maclean*, 277

BILL OF LADING.

*See SHIPPING, (2).*

BOND.

*See STAMP, (4).*

*Plea of Statute of Limitations to Action on.*

Debt on bond. The defendant, after craving oyer of the bond and condition, which was for payment of money pursuant to the covenant in an indenture of even date with the bond, and for performance of the covenants, &c. contained therein on the part of the obligors, pleaded that no cause of action in respect of the said writing obligatory, by reason of any breach of the said condition, or of the covenants &c. in the said indenture contained, had accrued at any time within twenty years next before the commencement of the suit.

*Held*, that the plea was bad, first, for not setting out the indenture, as it

might contain impossible covenants, in which case the bond would be single, and the plea to the breaches only would be bad; secondly, in not properly confessing a breach of the condition.

*Semble*, the proper form of plea would have been to set out the indenture; to aver performance of all that was performed within twenty years; to admit the breaches beyond twenty years; and to those breaches to plead the Statute of Limitations. *Sanders v. John James Coward*, 48

### BUILDING ACT.

*See* STATUTE.

### CHARTERPARTY.

#### *Construction of.*

1. By a charterparty, the owner of the ship agreed that she should proceed direct to Ichaboe, and there load a full and complete cargo of guano, by the ship's boats and tackle, and by the labour of the crew, and being so loaded, should proceed therewith to Cork or Falmouth, &c., and deliver the same, on being paid freight at 4*l.* 15*s.* per ton, restraint of princes and rulers, the acts of God and the Queen's enemies, fire, and perils of navigation, always excepted. Twenty-one working days to be allowed to the charterers, if the ship were not sooner discharged at the port of unloading. The charterers to ship bags and other materials requisite for loading the ship, and to supply the stores for the vessel, at cash prices, for the voyage, and to deduct the amount from the balance of freight; but in the event of the vessel being lost, or any other unforeseen causes preventing the completion of the charterparty, the owner agreed to pay the charterers the amount of their disbursements for such stores.

### CHARTERPARTY.

To a declaration on this charterparty, alleging as a breach of it, that the defendant, the shipowner, did not load a full and complete cargo of guano on board the ship at Ichaboe, he pleaded a plea, which stated, in substance, that he was prevented from doing so by an unforeseen cause, namely, that on the arrival of the ship at Ichaboe, and within a reasonable time afterwards, no guano was to be found there; and that he had paid to the plaintiffs the amount of their disbursements for stores for the vessel.

*Held*, that this plea was bad in substance, for that the fact of no guano being to be found was not such an "unforeseen cause preventing the completion of the charterparty" as entitled the defendant to pay the amount of the disbursements, and treat the charterparty as at an end, but that he was nevertheless bound by his positive contract to load a full cargo. *Hills v. Sughrue*, 253

2. A charterparty provided, that the ship should sail to any safe island or islands on the south-west coast of Africa, agreeably to instructions which were to be given to the captain in due time by the charterers or their agents, and there load, from the factors or the charterers, a full cargo of guano or other lawful produce, which the charterers bound themselves to provide; and being so loaded should proceed therewith to a safe port in the United Kingdom, and deliver the same on being paid freight at 3*l.* 18*s.* per ton, the freight to be paid *on unloading and right delivery of the cargo*, one-third in cash on arrival at port of destination, and the remainder by approved acceptances at three months, or cash equal thereto, &c. And it was further agreed, that, in case the charterers' agents should be unable to furnish a cargo of guano at the ports or places therein provided, they should have power to send the vessel to any

other safe port or ports, place or places, for the purpose of obtaining a cargo of guano in the manner aforesaid, or of other goods, &c., in which case they were to pay for such service, as hire for the said vessel, after the rate of 15s. 6d. per ton per month, such pay or hire to commence from the day of the vessel's clearing outwards at the Custom-house, London, and to terminate *upon the vessel's return to her port of delivery as thereinbefore provided for, and the discharge of the cargo.* If the freighters' agents intended so to employ the vessel, they were to give the master written notice of such their intention, on production whereof the freighters engaged to pay the owner, in cash on account, three months' pay for the hire of the vessel, and the balance to be paid *on the vessel's return as aforesaid.*

The charterers instructed their agent on the south-west coast of Africa that the ship should proceed according to his instructions, and that, in case she could not find a cargo, she should proceed where he deemed it likely to procure one. The vessel sailed, pursuant to the charterers' directions, to an island on the south-west coast of Africa, where the agent met her, and informed the captain that there was no guano to be had there, and that she must procure a cargo in Saldanha Bay, (another place on the same coast), and must proceed to the Cape for a license to load a cargo there. The vessel accordingly sailed for the Cape, but, being there required to enter into an engagement to sign and hand over bills of lading for the cargo, as a security for the charges of the license, the captain refused to do so unless the agent would make the freight payable according to the time employed, instead of according to the weight of the cargo; and the latter accordingly gave the captain notice that he en-

gaged him upon time, according to the latter clause of the charterparty:—*Held*, that, under such circumstances, this clause had come into operation, and that the time-freight was recoverable.

The vessel, having loaded a cargo of guano at Saldanha Bay, proceeded therewith to England, and, under the charterers' instructions, went to Southampton to discharge her cargo. The charterers wrote to the captain there, stating that, without prejudice to the charterparty, or any dispute connected with the vessel, their wishes were that it should be landed and warehoused in the Southampton docks in bulk, which was accordingly done:—*Held*, that upon such landing of the cargo the balance of the freight became payable. *Fenwick v. Boyd*, 632

## CLERGY.

See LIBEL, (1).

## COGNOVIT.

See PRACTICE, (8.) 1.

## COMMITMENT.

See SMALL DEBTS ACT.

## CONDITION.

See DEVISE, (3).

*Pleading—Condition subsequent—Averment of continuance of Estate.*

The defendants in replevin having avowed for rent in arrear, the plaintiff pleaded in bar, that, before the defendants had anything in the premises, R. F. was seised in fee, and by his will gave to his wife an annuity (with power of distress), issuing out of the premises, for her life, if she should so long continue his widow, and should not live with any other



man, except a father or brother or brothers. The plea then alleged the death of R. F. without altering his will, whereby his widow became seised of the annuity, and continued so seised until the plaintiff, in order to avoid a distress for arrears of the annuity, paid her the rent mentioned in the avowry:—*Held*, that the condition annexed by the will to the gift of the annuity was a *condition subsequent*; and therefore it was not necessary that the plea in bar should aver the continuance of the widowhood, &c. *Brooke v. Spong*, 153

### CONTRACT OF SALE.

*See* PRINCIPAL AND AGENT.  
RAILWAY SHARES.

### CONVEYANCER.

#### *Lien of.*

A certificated conveyancer has no lien for his charges upon deeds delivered to him, "with and in respect of" which he does certain business for the owner of the deeds. *Steadman v. Hockley*, 553

### CONVICTION.

#### (1). Under 17 Geo. 3, c. 56—*Habeas Corpus*.

The stat. 17 Geo. 3, c. 56, is repealed, so far as relates to the distribution of the penalties imposed thereby, by the 58 Geo. 3, c. 51, notwithstanding the erroneous recital in the latter act of the 13 instead of the 17 Geo. 3.

A conviction under the 17 Geo. 3, c. 56, s. 10, for being in possession of materials suspected to be purloined or embezzled, purported to be made upon the information on oath of the informer and other witnesses, and concluded by directing that the penalty

should be paid, applied, and distributed, as the law directs, according to the form and direction of the statute in such case made and provided:—

*Held*, first, that, as the application of the penalty was fixed by the statute, and the justices had no discretion therein, the conviction was sufficient in directing to be paid &c. as the law directs.

Secondly, that the conviction need not state the ownership or value of the materials, nor the defendant's knowledge of their having been purloined or embezzled; nor that the informer or witnesses were sworn in the presence of the accused; nor that the accused had not, when before the justices, applied, under the 12th section of the act, for time to produce the parties from whom he had the goods.

Thirdly, that it was sufficient if the conviction followed in substance the form given by the statute; and that it was no objection to it, that it stated the information to have been on the oath of the informer and other witnesses, (for the purpose of excluding the informer from any share in the penalty); or that the conviction purported to have taken place in a *township*; or that the information on which the *search-warrant* was granted stated only that the informer *had cause to suspect*, &c.

Quære, whether the validity of a *conviction*, where the right to remove it by certiorari is taken away by statute, can be questioned on motion for a habeas corpus, the *commitment* not being before the Court. *Boothroyd, In re*, 1

#### (2). Under 7 & 8 Geo. 4, c. 29, s. 39.

An information, under 7 & 8 Geo. 4, c. 29, s. 39, for stealing a growing ash-tree, the property of M., was preferred by R. to D., a justice of the

## COSTS.

peace, who summoned the offender. At the time and place fixed in the summons, he appeared, and was convicted by another magistrate, the defendant, D., the summoning magistrate, being present, but not taking any part. The conviction ordered the plaintiff "to forfeit and pay, over and above the value of the tree stolen, the sum of 5*s.*, and for the value of the tree stolen, 1*s.*, and also to pay the sum of 1*l.* 4*s.* 6*d.* for costs, to be paid on or before the 19th of March next, and in default of payment of the said *sums* to be imprisoned in the house of correction" at &c., "and there kept to hard labour for one month, unless the said *sums* shall be sooner paid." It then ordered the 5*s.* to be paid to the overseer, the 1*s.* to M., the party grieved, and the 1*l.* 4*s.* 6*d.* to be immediately paid to R., the complainant.

An action of trespass and false imprisonment having been brought against the defendant,—*Held*, that the conviction was good, notwithstanding it had not proceeded on the original information of the party aggrieved, or been made by the magistrate who received the original information and issued the summons on which the defendant appeared; nor was it invalidated by its mode of adjudicating the costs. *Tarry v. Newman*, 645

## COSTS.

### (1). *Of Special Jury.*

A special jury cause, of which the venue was in Middlesex, not having come on for trial at the sittings for which it was set down, the parties signed a consent that the record should be altered by changing the venue to London, and consented thereby to all necessary alterations consequent on such change of venue being

## COURT OF EXCHEQUER. 805

made in the record, and that jury process should be issued, &c., as if the cause had been regularly set down for the sittings in London; and that the rule for a special jury should be amended by directing it to the sheriffs of London, and a special jury should be thereupon summoned by the sheriffs of London; and that all the costs of and occasioned by that arrangement should be costs in the cause, and abide the event. The cause came on for trial at the sittings in London, and was then referred to an arbitrator, who decided it in favour of the defendant:—*Held*, that, under the above agreement, the defendant was entitled to the costs of the special jury summoned by him in London, as costs in the cause, without any certificate for a special jury. *Geeves v. Gorton*, 186

### (2). *Of Remanet.*

In trespass, the defendants pleaded four pleas, one of which was bad. The cause stood for trial at the Summer Assizes, 1844, but was then made a remanet. The defendants afterwards obtained leave to amend, by substituting another plea in the room of the bad one, on payment of the costs of the amendment, which were paid. The cause was tried at the Spring Assizes, 1845, when the defendants had a verdict on the issue on the amended plea, and the plaintiff on the other three issues:—*Held*, that the plaintiff was entitled to the costs of the remanet. *Waller v. Blacklock*, 715

## COURT OF EXCHEQUER.

*See CROWN.*

### *Revenue—Jurisdiction of.*

The equity jurisdiction of the Court of Exchequer as a Court of Revenue,



is not taken away by the stat. 5 Vict. c. 5. *Attorney-General v. Halling*, 687

## COVENANT.

Declaration in covenant stated, that plaintiff by indenture granted to defendant all the coals and mines of coal under certain lands; that defendant covenanted to pay to plaintiff, as the price of the coal so granted, £40 for every statute acre of the said coal which should be *found* under the said lands; and until the said price should be fully paid, to pay plaintiff £40, part of the said price, in each year, by two equal half-yearly instalments, whether the whole of an acre of the said coal should be gotten in every such year or not.

Averment, that, at the making of the indenture, *there were* under the said lands divers, to wit, fourteen acres of the said coal, and that divers, to wit, thirteen acres of the said coal still remained under the said lands: and that £40, for two of the half-yearly instalments of the said price for the coal aforesaid, became due and still was in arrear and unpaid to the plaintiff:—*Held*, on motion in arrest of judgment, that the declaration was bad, for not averring that coals had been *found* under the premises. *Jowett v. Spencer*, 662

## CROWN.

*Right of, to remove Cause into the Exchequer.*

An action of trespass qu. cl. freg. was brought in the Court of Common Pleas, to which the defendant pleaded pleas alleging that the locus in quo was within the limits of the forest of Waltham, that the Queen was seised in fee, in right of her Crown, of the forest, and justifying the trespasses

as the servant and by command of the Queen. This Court (after a two days' notice to, and hearing counsel on behalf of, the plaintiff) ordered the cause to be removed into the office of Pleas of the Exchequer, by a rule absolute in the first instance, on the allegation of the Attorney-General that the profit of the Crown came in question in the cause; the plaintiff being put in the same state of forwardness as he was in the Court of Common Pleas. *Attorney-General v. Hallett*, 97

## DEVISE.

(1). "*Issue*," *how to be construed*.

A testator devised lands to his grandson, G. D., to hold the same unto and to the use of the said G. D., for the term of his natural life; and from his decease, unto and to the use of all and every the *lawful issue* of the said G. D., their heirs and assigns for ever, equally, as tenants in common and not as joint-tenants, when and as he, she, or they should attain his, her, or their age or ages of twenty-one years. And the testator devised all the residue and remainder of his real and personal estate and effects, whatsoever and wheresoever, not before otherwise disposed of, to his daughter, S. D., absolutely, for her own sole and separate use.

*Held*, that, in the above devise, *issue* was to be construed "*children*," and therefore G. D. took an estate for life only, with remainder to his children as purchasers, and not an estate tail; and therefore that, on his death without issue, S. D. took under the residuary devise, notwithstanding a deed of disentailer executed by G. D. in his lifetime: for a deed of disentailer, executed under the 3 & 4 Will. 4, c. 74, has no effect in barring future contingent estates, unless the

party executing it was in fact a tenant in tail. *Slater v. Dangerfield*, 268

(2). *What words sufficient to pass real Estate.*

Devise as follows:—"I dispose of all my effects as follows: All my household goods, live stock, furniture, plate, wearing apparel, and other effects at this time in my possession, or that may hereafter become my property, unto my wife J. H. I bequeath to J. P. £200, to be paid to her at the death of my wife. But if my wife after my decease see fit to marry, her second husband shall have no claim whatsoever, that is, to sell or dispose of any part of the property now or hereafter may be in my possession; but the above sum of £200 shall be paid to J. P. at the time of my wife's marriage:"

*Held*, by *Pollock*, C. B., and *Parke*, B., *Platt*, B., dissentiente, that a remainder in fee in real estate did not pass by this devise. *Doe d. Haw v. Earles*, 450

(3). *Validity of Condition against disputing Devisor's Competency.*

A condition, in a will of real estate, that if the devisee shall dispute the will, or the testator's competency to make it, or shall refuse, when required by the executors, to confirm it, the disposition in favour of such devisee shall be revoked,—is valid in law. *Cooke v. Turner*, 727

## DISTRESS.

See STAMP, (2).

*Property of Distrainer in Goods distrained.*

The plaintiff lent a pianoforte to W., in whose hands it was seized under a distress for rent. While the

landlord's bailiff remained in possession by W.'s consent, a fieri facias against W., at the suit of another creditor was put into the premises, and the officer seized the piano-forte, and removed it to the premises of the defendant, an auctioneer, for sale:—*Held*, that the plaintiff (after demand and refusal to deliver it) was entitled to recover it from the defendant in trover. *Turner v. Ford*, 212

## EJECTMENT.

See EXECUTORS.  
LEASE, (4).

(1). *Several defences in.*

Where two persons delivered separate consent rules in ejectment, each claiming to defend as landlord, the one for the whole of the premises claimed in the action, the other for a part of them, specifically named in the rule, under adverse titles, the Court ordered the consent rules to be amended, by confining them respectively to such parts of the premises as were really in the occupation of each party or his tenants. *Doe d. Lloyd v. Roe*.

(2). *Application of 1 Geo. 4, c. 87, s. 1.*

The stat. 1 Geo. 4, c. 87, s. 1, enabling landlords to recover possession of premises unlawfully held over by tenants, does not apply to the case where the tenant holds under a lease, which has not expired by lapse of time, but a right of re-entry is claimed for non-performance of the covenants. *Doe d. Cundey v. Sharpley*, 558

## ELEGIT.

A writ of elegit cannot be sued out for part only of the sum recovered by a judgment, unless it shews on the face of it that the residue of the judg-

ment has been satisfied or otherwise disposed of.

Since the 1 & 2 Vict. c. 110, s. 11, an elegit need not describe the lands to be extended by metes and bounds; it is sufficient to describe them in any manner by which they may be identified. *Sherwood v. Clark*, 764

### EMBEZZLEMENT OF MATERIALS.

See CONVICTION, (1).

### ESTOPPEL.

See LEASE, (6).

In an action for the stipulated price of a specific chattel, the defendant pleaded payment into Court of a sum which the plaintiffs took out in satisfaction of the cause of action:—*Held*, that the defendant in that action was not estopped thereby from suing the plaintiffs for negligence in the construction of the chattel. *Rigge v. Burbidge*, 598

### EVICTIION.

See LEASE, (5).

### EVIDENCE.

See LIBEL, (1).

#### *Parol Evidence to explain Written Contract.*

1. The defendant, by a written contract, agreed to sell the plaintiff 60 tons of "Ware potatoes," at £5 a ton. It appeared in evidence that in the neighbourhood three qualities of potatoes were known, "Wares, Midlings, and Chats," *Wares* being the largest and best:—*Held*, that evidence was not admissible to shew that the plaintiff had in fact contracted for the sale to him of a particular *kind* of Ware potatoes, viz. "Regent's Wares," while those offered to him

by the defendant were of an inferior kind, viz. "Kidney Wares." *Smith v. Jefferys*, 561

2. By a written contract, the plaintiff agreed to perform at the defendant's theatre, and the defendant agreed to engage her for *three years*, and pay her a salary of £5, £6, and £7 per week in those years respectively:—*Held*, that parol evidence was admissible to shew that, according to the uniform usage of the theatrical profession, the plaintiff was to be paid only during the *theatrical season*—i. e. during the time when the theatre was open for performance—in each of those years.

Where a contract is contained in letters, it is sufficient if one of the letters bear a 1l. 15s. stamp, although, on the part of one of the contracting parties, the letters are written and signed by an agent. *Grant v. Maddox*, 787

### EXCISE.

#### *Liability for Possession of Adulterated Articles—Scienter—Appeal by Excise Officer, under 7 & 8 Geo. 4, c. 53.*

A dealer in and retailer of tobacco is liable to the penalty of £900, imposed by the 5 & 6 Vict. c. 93, s. 3, for having in his possession adulterated tobacco, although he had purchased it as genuine, and had no knowledge or cause to suspect that it was not so.

Where an officer of excise, by whom an information for penalties is exhibited, is absent at the time of the hearing, and there is an appeal against the judgment, on the part of the Crown, to the quarter sessions, under the 7 & 8 Geo. 4, c. 53, s. 82, the notices of appeal required by s. 83 may, by virtue of the 4 & 5 Will. 4, c. 51, ss. 22 & 23, be given and signed by any officer of excise who is present

## FISHERY.

conducting the proceedings. *Regina v. Woodrow*, 404

## EXECUTORS.

### *Ejectment by some of.*

Two or three co-executors may recover lands of their testator in ejectment, on a joint demise. *Doe d. Stace v. Wheeler*, 623

## EXTENT.

Upon a scire facias to recover a sum of money found due to the Crown for duties of customs, by an inquisition taken under a commission to find debts, it appeared on the record, that the commission, which was tested the 21st of February, and returnable the 15th of April, 1843, authorised the commissioners to inquire "whether J. D. is *now* indebted in any and what sums of money," &c. The inquisition was taken and returned on the 1st of March, 1843, and the jury found that J. D. was, *on the day of taking that inquisition*, indebted to the Crown in 262*l.* 10*s.*, for the duty of customs on silk imported by him between the 8th and 14th days of February, 1841, and that the said sum, and every part thereof, still remained due and unpaid:—*Held*, that this finding was good in form, and was warranted by the commission.

The scire facias was tested the 30th of March, 1843:—*Held*, that its having issued before the return day of the commission, was a mere irregularity, and not ground of error. *Dean v. Reginam*, 475

## FISHERY.

*Protection of supposed Owner of, under 7 & 8 Geo. 4, c. 29, ss. 35 & 63.*

The defendants, servants of P., apprehended the plaintiff while fishing in the night-time near the mouth

## FRAUDS, STATUTE OF 809

of the river Ogwen, in Carnarvonshire, in which river P. had a several fishery. In an action of trespass for this arrest, the defendants gave much evidence to shew that P.'s fishery included the place where the plaintiff was apprehended. The jury, however, defined the limits of the fishery so as to exclude that place by a few yards; but they also found that P. and the defendants reasonably believed that it included that place:—*Held*, that the defendants were entitled to the protection of the stat. 7 & 8 Geo. 4, c. 29, ss. 35 and 63. *Hughes v. Buckland*, 346

## FRAUDS, STATUTE OF.

### *Acceptance.*

1. The defendant ordered of the plaintiff *two* dozen of port and two dozen of sherry, with the understanding, that, if it were not approved, he should return it. The plaintiff sent him *four* dozen of port and four dozen of sherry. The defendant was not satisfied with its quality, and returned the whole, except one bottle of the port and one dozen of the sherry, with a letter to the plaintiff, in which he stated that his order was for two dozen of each kind of wine; that he should not have refused to keep the four dozen if the quality had suited him, but that as it did not, he returned the four dozen of port, minus one bottle which he had tasted, and three dozen of the sherry:—*Held*, that the defendant was liable only for the price of the wine he actually kept. *Hart v. Mills*, 85

2. A., being himself yearly tenant of a house to B., under-let the house and furniture at a weekly rent to C. A. being desirous of getting rid of his tenancy at the end of the current year, offered to sell the furniture to C. for £50; which C. thought too much, but verbally agreed to have it

## 810 HUSBAND AND WIFE.

valued, and to pay so much as it should be found worth, on B.'s agreeing to accept him as his tenant instead of A. The furniture was valued at £80, which C. refused to give, but then offered the £50. Before the expiration of the year, an agent of A. took the key out of the door, and gave it to C., telling him that he must settle with A. himself about the furniture. B. refused to accept C. as his tenant, and he continued to occupy the house and use the furniture as before, but continually giving notice to A. to take away the furniture, which he refused to do; and after the lapse of three months, C. sent it to a broker's:—*Held*, that, upon these facts, there was no evidence to go to the jury of an acceptance by C. of the furniture, under a contract of sale, to satisfy the Statute of Frauds. *Lillywhite v. Derereux*, 285

## GUARANTEE.

### *Consideration.*

*Held*, that no consideration appeared on the face of the following guarantee:—"1843, June 28. Mr. Price; I will see you paid for £5 or £10 worth of leather, on the 6th of December, for Thomas Lewis, shoemaker." *Price v. Richardson*, 539

## HABEAS CORPUS.

See CONVICTION, (1).

## HUSBAND AND WIFE.

### *Discharge of Wife from Custody under Judgment.*

Where an action is commenced against a feme sole, who marries during the pendency of it, and the plaintiff obtains judgment against her in her name when sole, and she is taken under a ca. sa. sued out upon such judgment, the Court will not discharge her out of custody on the ground

## INTERPLEADER ACT.

that she has no separate property. *Beynon v. Margaret Jones*, 566

## INFORMATION.

See WITNESS.

### *Cross-examination of Witness for the Crown—Disclosure of Informer.*

In an information by the Attorney-General for a breach of the revenue laws, a witness for the Crown cannot be asked, in cross-examination, "Did you give the information?"

For the rule of public policy, which protects a witness from being asked such questions as would disclose the informer, if he be a third person, equally applies to questions which would disclose whether the witness is himself the informer. *The Attorney-General v. Briant*, 169

## INSOLVENT.

### *As to what Debts discharged.*

Under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, s. 75, the prisoner is discharged only as to the particular debts and sums of money mentioned in his schedule to be due from him to the creditors named therein, and not generally as to all his debts then due to such creditors. *Leonard v. Baker*, 202

## INSPECTION OF DOCUMENTS.

See PRACTICE, (2).

## INSURANCE.

See PRACTICE, (5.) 1.

## INTERPLEADER ACT.

### *Interpleader Order, how far final.*

A judge's order made under the 6th section of the Interpleader Act, directed that the goods should be sold by the sheriff, and the money paid into

Court to abide the event of an issue to be tried between the claimant and the execution creditor. The issue was tried, and a verdict found for the claimant, who thereupon brought an action of trespass against the sheriff, for breaking and entering his dwelling-house, *and seizing his goods and converting them to his own use*. The Court made absolute a rule for striking out so much of the declaration as charged the seizure and conversion of the goods.

And *semble*, (per *Alderson*, B., and *Rolfe*, B.), the proceedings ought in such a case to be stayed altogether. *Abbott v. Richards*, 194

## JOINT-STOCK BANKING ACT.

*Declaration by Public Officer—Recital of Statute.*

A declaration in debt by the public officer of a banking company described the plaintiff as "one of the registered public officers for the time being of, &c., who now sues as such public officer as aforesaid," &c., and stated that the defendant had by the writ been summoned to answer the plaintiff as such public officer:—*Held*, on special demurrer, that it sufficiently shewed the plaintiff to have been the public officer at the time of the commencement of the action.

The declaration recited the stat. 7 Geo. 4, c. 46, as "an act of Parliament made and passed in the 7th year of the reign &c., for (amongst other things) the better regulating co-partnerships of bankers in England:"—*Held*, a sufficient recital of the act. *Esdaile v. Maclean*, 277

## JOINT-STOCK REGISTRATION ACT.

*Application of, to Railway Companies.*

The 26th section of the Joint-stock Registration Act, 7 & 8 Vict. c. 110, which prohibits the sale of shares,

before complete registration, in any joint-stock company formed after the 1st November, 1844, does not apply to railway companies requiring an act of Parliament. *Young v. Smith*, 121

## LANDLORD AND TENANT.

See LEASE.

## PROPERTY TAX.

(1). *Assignment by Tenant to Landlord of future Crops.*

The tenant for years of a farm, being indebted to his landlord, assigned to him, by deed, all his household goods, live stock, hay, and corn, as well in stock as then growing upon the farm, utensils and implements of husbandry, and also *all his tenant-right and interest yet to come and unexpired* in and to the farm and premises: to hold the said goods, cattle, chattels, tenant-right, effects, and things to the landlord, in trust to sell, and thereout to pay the debt, and to pay over the surplus to the tenant: and the tenant thereby granted to the landlord license and authority at any time to enter upon the farm, and take, carry away, and sell the goods, &c. thereby assigned:—*Held*, that under this assignment the tenant's interest in crops grown in future years of the term passed to the landlord. *Petch v. Tutin*, 110

(2). *Liability for holding over by Co-lessee.*

Where there is a demise to A. and B. for a term, and B. holds over after the expiration of the term, without A.'s assent, A. is not liable for rent becoming due during such holding over. *Draper v. Crofts and Bartlett*, 166

## LEASE.

(1). *Construction of Agreement for.*

A. agreed to let, and B. to take a piece of land, with liberty to build



thereon such warehouses, glasshouses, kilns, houses for workmen, and other erections necessary for carrying on the business of a glass manufactory, as he should think fit, for sixty-one years, at a certain rent; and B. agreed to pay the rent, to build in a substantial manner, and not to use the premises for any other purpose than a glass manufactory during the term; a lease and counterpart to be executed in conformity with the agreement, in which should be inserted all usual covenants:—*Held*, that this agreement did not warrant the insertion in the lease of an affirmative covenant by the lessee, that he *would* carry on the business of a glass manufactory on the demised premises during the term. *Doe d. The Marquis of Bute v. Guest, Bart.*, 160

(2). *What amounts to—How far affected by subsequent Agreement for Sale of Premises to Lessee.*

On the 28th October, 1843, the plaintiff, the defendant, and M., entered into an agreement, by which, after reciting that M. was tenant to defendant of a house, at a rent of £25 a year, and had agreed to let it to plaintiff at a rent of £20 a year, from 24th June, 1844, at which time defendant agreed to exonerate M. from his tenancy on his paying all rent up to that day, and to accept plaintiff as tenant from that period at the said rent of £20 a year; M. agreed to let and plaintiff to take the house, from the date of the agreement to the 24th June then next, at the rent of £20 a year; and M. agreed to find all materials, except lath, to put up a partition-wall, &c., plaintiff finding lath and labour. And plaintiff agreed to take the house of defendant from the 24th June at the rent of £20 a year, and to give or take six months' notice to quit the premises; and defendant agreed to exonerate M. from his ten-

ancy on the said 24th June, on his paying up all rent due to that time. Immediately after the execution of this agreement, M. let plaintiff into possession of the premises. On 4th March, 1844, defendant agreed to sell the house to the plaintiff, but this agreement was not carried into effect:—*Held*, first, that the instrument of 28th October, 1843, amounted to a lease of the premises by defendant to plaintiff from 24th June, 1844; secondly, that it was not affected by the subsequent agreement for the sale of the premises. *Tarte v. Darby*, 601

(3). *Construction of Proviso for Avoidance of, by Bankruptcy of Lessee.*

A lease for years contained a proviso for re-entry, in case the lessee "should at any time during the term commit any act of bankruptcy, whereupon a commission or fiat in bankruptcy should issue against him, and under which he should be duly found and declared a bankrupt." The lessee, being a trader, committed an act of bankruptcy, on which a fiat issued against him, and he was by the commissioners found and declared a bankrupt; but the petitioning creditor's debt on which the fiat was founded was proved by A. and B., as partners, whereas it was due to A., B., and C., as partners.

*Held*, by Pollock, C. B., and Platt, B., Parke, B., dissentiente, that the lessee was not *duly* found and declared a bankrupt, within the meaning of the proviso. *Doe d. Lloyd v. Ingleby*, 465

(4). *Determination of, by Ejectment for Forfeiture.*

The service by lessor upon lessee of a declaration in ejectment for the demised premises, for a forfeiture,

operates as a final election by the lessor to determine the term; and he cannot afterwards (although there has not been any judgment in the ejectment) sue for rent due, or covenants broken, after the service of the declaration. *Jones v. Carter*, 718

(5). *Eviction—how proved.*

Covenant for rent on a lease. Plea, that, before the lease was made, one P. impleaded the plaintiffs, and had judgment of elegit against their lands, &c.: that the inquisition found plaintiffs seised of the demised premises then leased to B., subject to two mortgages for years: that the sheriff delivered the demised premises to P., to hold &c. till his damages and costs should be levied thereout: that, before the rent became due, defendant was *evicted* by P., who entered and then ejected, *expelled*, put out, and removed defendant therefrom, and kept and continued him so ejected, &c.: that £1000 was still due to P., which was not levied. Replication traversed the eviction in the words of the plea. At the trial the lease, elegit, and inquisition, were put in, and it was proved that P. had called on defendant to pay him rent, or he, P., would turn him out, on which defendant attorned to him, without privity of the plaintiffs, his lessors:—*Held*, that the plaintiffs were entitled to recover, as P.'s elegit only entitled him to the reversion expectant on the mortgages by the lessors:—*Held*, also, that the expulsion, as pleaded, was not established by the evidence.

*Semble*, that if a party, having a paramount right to evict a party in occupation of premises, goes to him claiming to exercise his right, on which the tenant consents to change the title under which he holds, and attorns to the claimant accordingly, that would be equivalent to an expulsion. *The Mayor, Aldermen, and*

*Burgesses of the Borough of Poole v. Whitt.* 571

(6). *Reversion on, by Estoppel.*

In 1742 a farm was demised by the Broderers' Company to F. for 100 years, with a covenant for perpetual renewal. In 1827, the residue of this term had become vested in B., who in that year assigned it by way of mortgage, with a proviso for redemption. On the 22nd May, 1828, H. demised the same farm for twenty-one years to the plaintiff. On the 12th January, 1836, the mortgagees and H. surrendered the premises to the Broderers' Company. On the 13th January, 1836, the company demised them to H. for 100 years; and shortly afterwards the unexpired residue of that term, and all the estate and interest of H. in the premises, were assigned to the defendant.

In an action by the plaintiff against the defendant, on a covenant in the lease from H. to the plaintiff, to keep down the rabbits on the farm, the defendant pleaded, 1st, that H. did not demise to the plaintiff; 2nd, that the reversion on that lease did not vest in the defendant:—*Held*, that both these issues ought to be entered for the plaintiff; for that the lease, being by deed, was a good demise by way of estoppel, and a reversion in H. by estoppel was thereby created, which *prima facie* was a reversion in fee, and therefore was not surrendered to the Broderers' Company, but passed from H. to the defendant. *Sturgeon v. Wingfield.* 224

(7). *Title to Encroachment made by Lessee.*

Lessee for lives of a farm inclosed from an adjoining extra-parochial waste, over which there was a right of common in respect of his farm, some small pieces of land near but not actually contiguous to the farm.



The lessor was not lord of the waste:—*Held*, that, in the absence of evidence shewing a contrary intention, it was to be presumed that the lessee made the inclosures for the benefit of his lessor, to belong to him as part of the farm at the determination of the lease.

*Held*, also, that such presumption was not rebutted by the fact that the lessee, during the lease, made a conveyance of these inclosures to his son in fee, which, however, was not delivered, nor followed by any possession.

By writing indorsed on the lease, the lessee agreed that all inclosures made by him upon the said waste should be surrendered up to the lessor, his heirs, &c. at the end of the lease, and that the lessee should pay to the lessor, his heirs, &c. the sum of 6*d.* annually, as an acknowledgment for the same:—*Held*, that this was an admission on the part of the lessee that he had made the inclosures for the benefit of the lessor. *Doe d. Edward Lloyd v. Thomas Jones*, 580

### LIBEL.

#### (1). *Right of public Comment on the Clergy—Evidence.*

The conduct and management, by the clergyman of a parish, of a charitable society in the parish, from the benefits of which Dissenters are by his sanction excluded, is not the lawful subject of public comment, so as to excuse, under the plea of not guilty, the publication of untrue and injurious matter respecting the clergyman in relation to the charity.

*Quære*, whether sermons preached in a church, but not published, are the lawful subject of such public comment.

In an action for a libel published in a newspaper, evidence that copies of the newspaper containing the libel

### LIMITATION ACT.

have been gratuitously circulated in the plaintiff's neighbourhood, though they be not shewn to have been sent by the defendant, the publisher is admissible to shew the extent of the circulation of the paper, and the consequent injury to the plaintiff.

It was sought to prove that one of such newspapers had been sent to a public reading-room in the plaintiff's parish, to which there were eighty subscribers. The president of the reading-room stated, that a newspaper, called the "*Nonconformist*," (which was the name of that published by the defendant), was gratuitously sent to the room; that, from the glance he had of it, he judged it contained the libel in question; that it remained there a fortnight, when it was taken away (as he supposed) and not returned; that he had searched the room for it, and believed it was lost:—

*Held*, first, that this was sufficient evidence to shew that the newspaper sent to the reading-room was one of the copies of the defendant's newspaper containing the libel; secondly, that this was sufficient proof of its loss to make secondary evidence of its contents admissible. *Gathercole v. Miall*, 319

#### (2). *Pleading under 6 & 7 Vict. c. 96.*

In an action for a libel published in a newspaper the special plea of apology and payment into Court, given by the stat. 6 & 7 Vict. c. 96, s. 2, cannot be pleaded along with not guilty to the same part of the declaration. *O'Brien v. Clement*, 435

### LIEN.

See CONVEYANCER.

### LIMITATION ACT.

*Construction of, as to Tithes.*  
The Limitation Act, 3 & 4 Will. 4,

## LIMITATIONS, STATUTE OF.

c. 27, s. 2, enacts, that no person shall bring an action to recover any land (which, by s. 1, includes *tithes*) but within twenty years next after the right to bring such action has accrued to him, or some person through whom he claims:—*Held*, that this statute does not operate to prevent the tithe-owner from recovering tithes *as chattels* from the occupier, although none had been set out for twenty years; but that it is confined to cases where there are two parties, each claiming an adverse *estate* in the tithes. *The Dean and Chapter of Ely v. Cash*, 617

## LIMITATIONS, STATUTE OF.

See BOND.

### *Continuing Writs—Pleading.*

In an action on a bill of exchange, dated in May, 1838, the original writ of summons into Middlesex was issued on the 15th of August, 1844; on the 14th of January, 1845, it was returned non est inventus and filed, and entered of record; on the same day an alias writ of summons was issued into Middlesex; on the 10th of June, 1845, a pluries writ of summons was issued into Surrey, and served the same day, and the defendant duly appeared to it; the plaintiff declared, and the defendant pleaded, that the cause of action did not accrue within six years next before the commencement of the suit. The alias writ of summons was not in fact returned or entered of record till the 4th of July, 1845. The Nisi Prius record was made up, stating only that the defendant was summoned to answer the plaintiff by virtue of a writ issued on the 15th day of August, 1844, and on its production at the trial the plaintiff obtained a verdict.

The Court held, that the provisions of the stat. 2 Will. 4, c. 39, s. 10,

## MONEY PAID. 815

had not been complied with, and made absolute a rule to amend the Nisi Prius record, by stating the continuances according to the truth, at the costs of the plaintiff.

Where a writ issued within six years after the cause of action accrued has not been duly continued, pursuant to the 2 Will. 4, c. 39, s. 10, the defendant is not bound to plead such non-continuance specially, but may take advantage of it under the general plea, that the cause of action did not accrue within six years next before the commencement of the suit; for, *for this purpose*, the last writ which is served, is the commencement of the suit, *Pratt v. Hawkins*, 399

## LONDON COAL ACT.

The London Coal Act, 1 & 2 Will. 4, c. lxxvi, s. 57, imposes a penalty not exceeding £5 on the seller of coals, for every sack that shall be found deficient, on its being weighed in pursuance of the act:—*Held*, that, where several sacks are sent out to a purchaser at the same time under one contract, one penalty only is incurred in respect of a deficiency in weight, though every sack is so deficient; and therefore, where seventeen sacks were so found deficient, that the penalties were recoverable by action of debt in one of the superior courts, notwithstanding s. 77, which directs that all penalties imposed by the act not exceeding £25, shall be levied and recovered before justices of the peace, *Collins v. Hopwood*, 459

## MODUS.

See TITHES.

## MONEY PAID.

See PROPERTY TAX.

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## 816 PARTICULARS of DEMAND.

### MONEY HAD AND RECEIVED.

*See RAILWAY SHARES, (2).*

### PALACE COURT.

*See SMALL DEBTS ACT.*

### PARTICULARS OF DEMAND.

#### (1). *Construction of.*

The plaintiff's particulars of demand claimed "the sum of £450, for his services as clerk or manager to the defendant, from August, 1837, to October, 1839, inclusive, after the rate of £200 per annum." The proof was of an agreement by the defendant that the plaintiff, who was the manager of a banking company, should have a certain per centage by way of commission on all business he should introduce to the defendant:—*Held*, that the particulars were not sufficient to let in such a demand, and that the defendant was in strictness entitled to a nonsuit. *Law v. Thompson,* 541

#### (2). *In Action against Railway Company.*

1. In an action by an engineer against the committee of a railway company for making the survey, &c., the particulars of demand merely claimed certain aggregate sums in respect of the survey of a stated number of miles, and for tavern and travelling expenses, assisting the solicitor with books of reference, engraving plates of plans, printer's account, &c. The Court refused to order fuller particulars. *Higgins v. Ede,* 76

2. In an action by an engineer against the committee of a railway company, for making the survey, &c., the particulars of demand claimed an aggregate sum for surveying and

## PARTNERSHIP.

levelling the line, making trial sections, finding surveyors, levellers, and engineers, meeting and arranging with the solicitors, assisting at the reference, superintending the engravings, &c. &c., including tavern bills, travelling charges, office expenses, &c. &c.,—so many miles, at a certain sum per mile. The Court refused to order fuller particulars, or to compel the plaintiff to distinguish between his own personal charges and those of the surveyors &c. employed by him, or to particularise the sums actually expended by him. *Rennie v. Beresford,* 78

## PARTNERSHIP.

### *By what Words constituted.*

A. sold to B., by deed, his interest in the profession and practice of a surgeon and apothecary, carried on by him in Park-street, Camden-town, for 900*l.*, 500*l.* to be paid on the execution of the deed, and 400*l.* at the expiration of a year. A. covenanted not to exercise the profession within three miles of his then place of business; and also, that, during the space of one year from the date of the deed, he should continue to reside in Park-street aforesaid, and to carry on and attend to the said profession and practice as he had hitherto done; and that he would, to the utmost of his power, introduce B. to his patients, and do every reasonable act for promoting the interest of the concern. And B. covenanted, in consideration thereof, to allow A., during the year, a moiety of the clear profits of the concern, to be paid at the expiration thereof:—*Held*, that the parties were not hereby constituted partners in the trade during the first year, and, therefore, that B. might sue A. for monies received by him from their patients during that year. *Rawlinson v. Clarke,* 292

## PLEADING.

See ACCORD AND SATISFACTION.  
ACTION ON THE CASE.  
BILL OF EXCHANGE, (2), (3).  
BOND.  
CONDITION.  
COVENANT.  
JOINT STOCK BANKING ACT.  
LIBEL, (2).  
LIMITATIONS, STATUTE OF.  
PRESCRIPTION ACT.  
STATUTE.

## I. Declaration.

(1). *Certainty requisite in.*

A declaration in assumpsit stated, that the defendant was an attorney, and that, in consideration that the plaintiff would retain him as such attorney to conduct an action of tort at the suit of B. against L., the defendant promised to fulfil his duty as such attorney, in and about prosecuting the said action, and recovering damages; that the defendant did, under the said retainer, commence an action against L., in which judgment was recovered against him for £56; that the defendant afterwards, *as such attorney as aforesaid*, for obtaining satisfaction of the said damages, sued out a fi. fa. against L., to which the sheriff returned that he had levied £9, part of the damages, and nulla bona as to the residue; that the defendant, *as such attorney as aforesaid*, for obtaining satisfaction of the said residue, issued a ca. sa., under which L. was imprisoned, and paid the residue of the damages to the gaoler, who paid the same to the defendant, as such attorney as aforesaid; and that, before he received the same, he sent, as such attorney as aforesaid, to the gaoler a discharge of L. out of custody, by virtue whereof he was discharged. Breach, that, although the defendant received the said damages, and the plaintiff paid to him, as such attorney

as aforesaid, his costs of prosecuting the said action, he did not pay over to B. or the plaintiff the residue of the said damages.

*Held*, that this declaration was bad, on special demurrer, for not shewing distinctly that the money was received by the defendant under his original retainer by the plaintiff in the action against L. *Bevins v. Hulme*, 88

(2). *Misjoinder of Counts.*

A declaration, commencing and concluding in the form of a declaration in debt, contained counts on bills of exchange by indorsee against indorser, in the form given by the rule of T. T., 1 Will. 4, and also indebitatus counts in debt:—*Held*, not a misjoinder. *Esdaile v. Maclean*, 277

(3). *In Assumpsit for Breach of Promise of Marriage.*

Declaration in assumpsit for breach of promise of marriage stated, that the defendant promised to plaintiff to marry her; that the plaintiff remained and still is sole and unmarried, and, during all the time aforesaid, was ready and willing to marry the defendant, of which he always had notice; yet the defendant disregarded his promise, and wrongfully married another woman.

Plea, that the defendant was not, at any time before the commencement of the suit, requested by the plaintiff to marry her:—*Held*, first, that the plea was bad, on special demurrer; secondly, that the declaration was good, on general demurrer, without an averment of the lapse of a reasonable time. *Caines v. Smith*, 189

II. *Pleas in Abatement.*(1). *Auter Action pendent.*

In an action of contract against A., he cannot plead in abatement the pen-

dency of another action for the same cause against B. *Henry v. Goldney*, 494

(2). *Affidavit of Verification.*

In an affidavit of verification of a plea in abatement of the non-joinder of A., as a defendant, his residence was declared to be "43, Lowndes-street, Belgrave-square." It appeared that he was residing there at the time of the commencement of the suit, but had since gone abroad; that the house and furniture were his; that he was endeavouring to let the house furnished for a few months, until his return from abroad; and that B. was occupying it as his friend and guest:—*Held*, that this was a sufficient description of A.'s residence, within the stat. 3 & 4 Will. 4, c. 42, s. 8.

The "residence" mentioned in that statute means the domicile or *home* of the party. *Lambe v. Smythe*, 433

### III. *Pleas in bar.*

(1). *Accord and Satisfaction.*

In indebitatus assumpsit for money due on an account stated, it is not sufficient to plead that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, defendant and plaintiff accounted together of and concerning the said causes of action, and all other claims and demands then being between plaintiff and defendant, amounting to a large sum, to wit, £1000, and that on such accounting a small sum, to wit, £150, was then found to be due and owing from defendant to plaintiff, which defendant then promised plaintiff to pay, and afterwards, before commencement of the suit, paid to plaintiff, who accepted it in full satisfaction of the sum due to him from defendant; for such a plea does not shew that, at the time of the second accounting relied

on, any cross demand by defendant against plaintiff existed, or that, if it existed, it had not been agreed to be given up by defendant in consideration of plaintiff's giving up some other demand of his on defendant, so as to make payment of the balance a satisfaction of the larger sum. *Smith v. Page*, 683

(2). *Payment into Court.*

1. A plea of payment into court, in an action of debt, must be pleaded to the *damages*, as well as to the *debt*: and the form of plea given by the rule of Trinity Term, 1 Vict., must be varied to meet the case. *Low v. Steele*, 380

2. Justices and other officers paying money into court under particular statutes, are not bound to state in the plea of payment into court the character in which they make the payment.

To an action for assault and battery, the defendant pleaded payment into court of £25, pursuant to the rule of Trinity Term, 1 Vict. c. 7. The plaintiff replied damages ultra; on which issue was joined, and the defendant obtained a verdict:—*Held*, that the plaintiff was not entitled to judgment non obstante veredicto, because, although the plea of payment into court is prohibited in an ordinary action of assault and battery, by the 3 & 4 Will. 4, c. 42, s. 21, it did not appear upon the record that the defendant was not a person entitled under some other statute to pay money into court by way of amends in such an action. *Aston v. Perkes*, 385

(3). *Set-off.*

Where the amount proved under a plea of set-off, pleaded to the whole declaration, does not cover the plaintiff's demand in the action, the defendant cannot have a verdict on the

plea for the amount proved, but it will go in reduction of damages.

The plaintiff and the defendant were partners. They dissolved the partnership, the plaintiff agreeing to take all the debts of the firm upon himself, and to release the defendant from liability, and the defendant giving him a bond for a certain sum payable by instalments. The plaintiff failed to pay a debt due from the firm, whereupon the creditors sued the defendant, and obtained judgment, and issued a *fi. fa.*, under which the sheriffs seized and sold the defendant's goods, and out of the proceeds paid the debt.

*Semble*, that in an action on the bond, the defendant was entitled to set off, as *money paid*, the sum so paid by the sheriff. *Rodgers v. Maw*, 444

(4). *Plea of Release when set aside.*

The Court will not set aside a plea of a release by one of several co-plaintiffs, unless it is clearly shewn to have been made in fraud of the other plaintiffs, or unless the releasor be a mere nominal party to the action, having no interest whatever in the subject-matter of it. *Rawstorne v. Gandell*, 304

(5). *Plea to part, not bad because it is an answer to more.*

To a declaration containing two counts, the first on a promissory note for £15, the second in £30 on an account stated, the defendant pleaded to the first count a plea alleging special circumstances as to the making of the note, which shewed that it was given without consideration, and upon a misrepresentation of facts; and he then pleaded, as to £15, parcel of the money and causes of action in the last count mentioned, that the making of the note in the first count mentioned, was and is the said account in

the last count mentioned, so far as the same relates to the said sum of £15, parcel &c., and that the several allegations and statements by the defendant made in his first plea were and are true, *modo et formâ*.

On special demurrer to the second plea, on the ground that, though it professed to answer only a part of the count on the account stated, it nevertheless presented an answer to the first count also:—*Held*, that the plea was good. *Hammond v. Dayson*, 373

IV. *Replication.*

(1). *What sufficient Confession and Avoidance—Duplicitv.*

Assumpsit on a bill of exchange for £50 by drawer against acceptor, with counts for money lent, and on an account stated.

Plea to the first count, that before the bill became due, G. had agreed to pay defendant certain sums by monthly instalments of £40; that defendant was unable to pay the bill, and thereupon, while plaintiff was holder, and before it became due, in consideration that defendant, with *assent* of G., and at request of plaintiff, would permit plaintiff to receive from G. so much of the instalments of £40 as should amount to the sum in the bill, plaintiff agreed to accept payment of the bill thereout, and to discharge defendant from performing the promise in the first count.

Averment, that plaintiff received the first instalment, but neglected of his own wrong to procure payment of the residue from G. out of the next instalment.

Replication, that, in consideration that defendant would, with assent of G., at request of plaintiff, permit plaintiff to receive from G. so much of the instalments of £40 as should amount to the sum in the bill, plaintiff did not agree to accept &c. (traversing the plea in terms):—*Held* bad, on spe-



cial demurrer, for not expressly traversing the agreement, and for leaving it uncertain whether it meant to put in issue simply the agreement, or the consideration, or both, or that G., by plaintiff's consent, *agreed* to pay the bill out of the instalments, so as to substitute themselves as debtors to plaintiff on the defendant's acceptance.

Eighth plea, as to £50, parcel of the monies in the second and last counts, that before breach of the promises in those counts, plaintiff drew his bill for £50, which defendant accepted and delivered to plaintiff, who then accepted and received the same *in discharge* of the said sum of £50, parcel &c., and then indorsed and delivered the same to S., who from thence hitherto hath been and is still the holder thereof, and entitled to sue defendant on the same.

Replication, that the bill became due before the commencement of the suit, and defendant did not pay it, and that S., before the commencement of the suit, returned the bill to plaintiff, who then became the holder, and continued so to the commencement &c., and still is the holder:—*Held* bad, on special demurrer, for setting up fresh matter, without confessing and avoiding, or expressly traversing the averment of S. being holder at the commencement of the action.

The word “discharge” in the plea imported not payment or satisfaction of the debt, but only that the bill was given “for and on account of” it.

The ninth plea resembled the eighth, except in averring, that whilst S. was holder, defendant and K., at his request and on his account, respectively paid him its amount.

Replication, traversing the payment, &c., of the bill in the terms of the plea, and generally, and averring the return of the bill by Sharp to plaintiff, and the holding of it by plain-

tiff, as in the replication to the eighth plea:—*Held* bad, on special demurrer, for like reasons as the eighth.

Where plaintiff, instead of demurring to a double plea, replies double, he must not reply argumentatively, or by setting up fresh matter without confessing and avoiding the plea.  
*Kemp v. Watt,* 672

(2). *To Justification under Judgment*  
—*Allegation of Judge's Order setting it aside.*

In trespass for assault and false imprisonment, the defendant justified under a judgment and writ of *ca. sa.* issued at his suit against the plaintiff.

Replication, that the judgment was not a judgment signed in any action, but under colour of a document purporting to be a warrant of attorney; that, after the issuing of the *ca. sa.*, a judge ordered the judgment and writ to be set aside; that the order was afterwards, to wit, on &c., made a rule of court; and that the judgment and writ were so set aside on the ground that the warrant of attorney was never delivered as a complete authority to do the acts therein specified, but as an escrow, to take effect in a certain event, which never happened, and was to be kept by the plaintiff in his own possession till such event should happen; and that the defendant, by an improper and fraudulent contrivance, obtained and kept possession of it against the plaintiff's will; that the judgment was signed under colour of the said document, and the *ca. sa.* issued thereon, without the plaintiff's consent.

*Held*, on demurrer, that the replication was good: 1st, that it was not necessary it should shew that the judgment was set aside for *irregularity*, inasmuch as it sufficiently shewed that it was set aside as having been signed against good faith;

2ndly, that it was not necessary to state that the judge's order was made a rule of court before the commencement of this suit, inasmuch as a judge at chambers had authority to set aside the judgment and writ; and 3rdly, that this was not a case in which the plaintiff ought to have replied nul tiel record. *Brown v. Jones*, 191

## PRACTICE.

See ATTACHMENT.

COSTS.

PARTICULARS OF DEMAND.

PROCESS.

(1). *Time for Pleading after Summons for Particulars dismissed.*

Where a defendant, having obtained an order for time to plead, takes out a summons for particulars, which is dismissed after the expiration of the time given for pleading, he is entitled only to the remainder of the same day for pleading. *Mengens v. Perry*, 537

(2). *Inspection of Documents.*

In an action by an allottee of railway shares against a member of the provisional committee, to recover back his deposit, the Court ordered that the plaintiff should have an inspection and copy of the subscribers' agreement and parliamentary contract, which both the plaintiff and the defendant had signed, and which were in the hands of the solicitors of the company; the plaintiff's affidavit stating that an inspection of them was necessary to him for the purpose of framing his case, and the defendant not shewing that they were not within his power or control. *Steadman v. Arden*, 587

(3). *Judgment as in case of Nonsuit — Discontinuance — Stay of Proceedings.*

The plaintiff, being under a per-

emptory undertaking to go to trial on the 10th of January, obtained a side-bar rule to discontinue on payment of costs, the plaintiff undertaking to pay the said costs, and consenting to judgment of non pros. if not paid in four days. On the 10th of January the plaintiff's attorney obtained and served on the defendant's attorney an appointment for taxation at eleven o'clock on the 12th, at which time the defendant's attorney attended before the Master, but protested against the rule to discontinue as being irregular, and declined to bring in his costs to be taxed; and on the same day he obtained a rule absolute for judgment as in case of a nonsuit:—*Held*, that this judgment was regular. A rule to discontinue is not a stay of proceedings. *Beeton v. Jupp*, 149

(4). *Short Notice of Trial.*

Where a defendant is under terms to take short notice of trial, if necessary, it lies upon the plaintiff to shew the necessity of a shorter notice than the ordinary one. And where the defendant being under such terms, the plaintiff delivered a replication on the 14th of May, which on the 19th he abandoned, and delivered another with the similiter added; on the 21st obtained an order to try before the sheriff; on the 23rd delivered the issue with notice of trial for the 28th; and on the latter day tried the cause as undefended, and obtained a verdict, the Court set it aside with costs, on the ground that the plaintiff had had time to give the ordinary notice. *Drake v. Pickford*, 607

(5). *Right to begin at Trial.*

1. By a policy of insurance on life, it was stipulated to be void, if anything stated by the assured to the directors of the assurance company, previous to the execution of the policy, should



be untrue. A party desiring to be assured made a statement to the directors, that he had not been afflicted with a number of specified diseases, inter alia, rupture, or any other disorder which tends to the shortening of life. At his death his executors sued on the policy, and in their declaration averred the truth of the statement made by the assured. Plea, that the said statement was untrue, to wit, in this, that the assured, at the time of the making thereof, was afflicted with rupture; concluding, not to the country, but with a verification. The plaintiffs replied *de injuriâ*:—*Held*, that the plaintiffs were entitled to begin at the trial; and, the judge having ruled the contrary at *Nisi Prius*, a new trial was ordered. *Ashby v. Bates*, 589

2. In an action by payee against maker of a promissory note for 100*l.* and interest, the defendant pleaded, as to parcel of the monies, pleas the issues upon which lay on the defendant; and to the residue, payment of a sum of money into court, and that the defendant was not indebted in a greater amount; to which the plaintiff replied that the defendant was indebted to him in a greater amount, and issue was joined thereon:—*Held*, that the plaintiff was entitled to begin at the trial. *Booth v. Millns*, 669

(6). *New Trial for Misdirection on one of several Issues.*

Where, in trespass, there were several issues, one of them on a plea of lib. ten., and the judge at the trial improperly rejected evidence applicable to that issue only, the Court discharged a rule for a new trial, after a verdict for the defendant on other issues, on his consenting to the verdict being entered for the plaintiff on that issue; and gave no costs of the rule to either party. *Hughes v. Hughes*, 701

(7). *Notice of Taxation.*

No notice of taxation is necessary, where the plaintiff appears for the defendant *sec. stat.*; although the defendant's attorney afterwards takes out and serves a summons for time to plead. Such summons is not tantamount to an appearance, within the rule of Hilary Term, 4 Will. 4, s. 17. *Welch v. Vickery*, 59

(8). *Final Judgment.*

1. *On Judge's Order on Consent.*

The "Order of the Judges" of 12th June, 1845, printed ante, Vol. 14, p. 335, is not a rule of Court, but a mere regulation for the guidance of the judges at chambers; and, therefore, where a judge's order for judgment had been obtained on a written consent, signed by a defendant, and attested by an attorney acting also for the plaintiff, the Court refused to set aside the order and judgment signed thereon. *Dixon v. Sleddon*, 427

2. *When to be signed, after Certificate of Arbitrator.*

Where a verdict was taken by consent for the plaintiff at *Nisi Prius*, subject to the certificate of a barrister, to be given in the following Michaelmas Term, with power to enlarge the time for making it; and he enlarged the time till the following Easter Term; and in the month of March gave his certificate, directing that the verdict should stand for a smaller amount:—*Held*, that final judgment might be signed immediately on the entry of this verdict upon the *postea*, and that the plaintiff was not bound to wait until after the expiration of the four first days of Easter Term. *Cromer v. Churt*, 310

## PREScription ACT.

### PREScription ACT.

#### *Construction of—Pleading.*

In case, the declaration stated, that the plaintiff was lawfully possessed of a mill, and by reason thereof of right ought to have and enjoy the benefit of the water of a watercourse which ran and flowed, by means of a weir therein erected a little above the plaintiff's mill, being kept at a certain height, unto the said mill of the plaintiff, for supplying it with water for the working thereof, and complained, that the defendant wrongfully pulled down the weir, and placed and kept it at a lower height than it ought to have been, &c.

The defendant pleaded, that, before and at the times when &c., he was the occupier of a certain close adjoining to the watercourse, and that he and all others the occupiers for the time being of the said close for twenty years *next before the commencement of the suit*, enjoyed, as of right and without interruption, the right of from time to time, as occasion required, removing a part of the weir, and placing and keeping it at a lower height than the rest, to such an extent and for such a time as was necessary for diverting enough of the water to irrigate the said close; that, at the times when &c., irrigation was necessary for the close, wherefore the defendant removed the said part of the weir, and placed and kept it at such lower height, to such an extent and for such a time as, and no more or longer than, was necessary for diverting the water for the irrigation of the said close: *quæ sunt eadem*, &c.

*Held*, that this plea was good; that it was not an argumentative traverse of the right alleged in the declaration, inasmuch as it set up a right which, under the stat. 2 & 3 Will. 4, c. 71, was not complete until the commencement of the suit, and therefore was not

## PROPERTY TAX. 823

inconsistent with the plaintiff's right to have the weir at a greater height at the time of the act complained of. *Ward v. Robins*, 237

### PRINCIPAL AND AGENT.

#### *Sale by Principal as Agent.*

Where the plaintiff made a written contract for the sale of goods, in which he described himself as the agent of A., and the buyer accepted and paid the price of a portion of the goods, and had then notice that the plaintiff was himself the real principal in the transaction, and not the agent of A.:—*Held*, that the plaintiff might sue in his own name for the non-acceptance of and non-payment for the residue of the goods. *Rayner v. Grote*, 359

### PROCESS.

#### (1). *Amendment of, to save Statute of Limitations.*

The Court will amend alias and pluries writs of summons, by indorsing thereon the day of the date of the first writ of summons and of the return thereto, in order to save the Statute of Limitations, notwithstanding the 2 Will. 4, c. 39, s. 10. *Culverwell v. Nugee*, 559

#### (2). *Distringas—At what Time issuable.*

A writ of distringas may issue within a reasonable time after the expiration of four months from the issuing of the writ of summons. *Peyton v. Wood*, 608

### PROMISSORY NOTE.

*See* STAMP, (3).

### PROPERTY TAX.

*Right of Tenant to sue Landlord for Money paid for Property Tax.*

Where a tenant pays property tax

assessed on the premises, and omits to deduct it in his next payment of rent, he cannot afterwards recover the amount as *money paid* to the use of the landlord. *Cumming v. Bedborough*, 438

## RAILWAY ACT.

See JOINT STOCK REGISTRATION ACT.

*Construction of.*

A railway act provided, that in case of refusal by the owners of lands required for the railway, to accept the purchase money, or compensation awarded by a jury, &c., the money might be deposited in the Bank of England, to the credit of the parties interested in the lands, in the name of the Accountant-General of the Court of Chancery. The company were prohibited from entering on lands without consent, till payment, or deposit in the Bank, of the purchase money or compensation. Another clause enacted, that if the company should *wilfully* enter upon and take possession of any lands without consent, or without having made such payment or deposit, they should forfeit to the party in possession a penalty of £10, to be recovered before justices; and if they should, after conviction in such penalty, or after notice from the party in possession, continue in *unlawful possession* of such lands, they should be liable to forfeit £25 a day, to be recoverable by action: Proviso, that nothing therein contained should subject the company to the payment of any such penalties as aforesaid, if they should *bonâ fide*, and without collusion, have paid *or deposited* the compensation agreed or awarded to be paid for such lands, to any person whom they might reasonably believe to be entitled to the lands, though he were not legally entitled thereto. The

company, *bonâ fide*, and without collusion, took possession of lands in respect of which compensation had been awarded by a jury under the act, after they had deposited the amount thereof in the Court of Chancery, to the credit of the plaintiff, the person in possession, but without having performed certain conditions precedent to their right so to deposit it, and retained such possession after notice:—*Held*, that they were protected by the proviso from liability to the penalty of £25 a day:—*Held*, also, that the word “*wilfully*,” in the above clause, applied only to the first branch of it. *Hutchinson v. The Manchester, Bury, and Rossendale Railway Company*, 314

## RAILWAY COMPANY.

See PARTICULARS OF DEMAND, (2).

(1.) *Liability of Provisional Committee-man to Third Parties.*

1. The defendant, in answer to an application from the secretary of a railway company to allow his name to be placed on the provisional committee, wrote to him consenting to do so, and stating that “he concluded his liability would be limited to the amount of his shares.” His name was accordingly published in the newspapers as one of the provisional committee, and on one occasion he attended and acted as chairman at a meeting of the committee.

*Held*, that he was liable for the price of stationery supplied by the plaintiff, on the order of the secretary, and used by the committee, after the date of his letter to the secretary. *Barnett v. Sir Henry Lambert*, 489

2. The mere fact of a person agreeing to become a member of the provisional committee of an intended railway company, amounts to no more than a promise that he will act with other persons, appointed or to be ap-

pointed, for the purpose of carrying the scheme into effect. Therefore, in an action against a provisional committee-man for goods supplied on the order of the solicitor of the company, it was held that the law would not imply, from the mere fact of his agreeing to be a member of such committee, an authority from him to the other members of it to make contracts by himself or by the solicitor, nor an authority to the solicitor to make them on behalf of the committee.

If the party not only consents to be a provisional committee-man, but authorises his name to be inserted and published in a prospectus, which merely states the names of the members of the provisional committee, and nothing more, that fact does not alter the liability. If it state the names of an acting or managing committee also, it is a question for the jury to say, whether it means that the latter are to take upon themselves the whole management of the concern, or that the former have constituted the latter their agents to manage it on their behalf, in which case the former would be liable for the contracts of the latter. Or, if the solicitor's name were mentioned in it, the question for the jury would be, whether it meant that he was to be employed by those of the committee who acted, or that he was already appointed by all whose names were mentioned, as their solicitor, to do all solicitor's work on their behalf; and further, what was the business then usually transacted by solicitors, in such undertakings, on behalf of the company. And the same as to the secretary.

Where there is also evidence that the defendant has *acted* with relation to the proposed scheme, it is a question for the jury, whether by his consent and acts, he has authorised the solicitor, or secretary, or any member of the committee, to pledge his credit

for the necessary and ordinary expenses to be incurred in forming such a company; and if so, whether the work was done, and the credit given, on the faith of his being liable.

Such an intended association does not constitute a partnership, inasmuch as it constitutes no agreement to share in profit or loss. *Reynell v. Lewis*; *Wyld v. Hopkins*, 517

(2). *Liability of Provisional Committee-man to Allottee.*

A railway company was provisionally registered, and a prospectus was issued, which stated the proposed capital to be £2,000,000, in 80,000 shares of £25 each. The plaintiff applied to the provisional committee for seventy shares, in a letter whereby she undertook to accept the same or any less number that they might allot to her, to pay the deposit of 2*l.* 12*s.* 6*d.* per share thereupon, and to sign the parliamentary contract and subscribers' agreement when required. To this letter she received an answer, signed by the secretary, stating that the committee of management had allotted to her thirty shares, and requesting her to pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to 78*l.* 15*s.*, into one of certain banks on or before a day mentioned. The plaintiff accordingly paid into one of those banks, in due time, the deposit of 78*l.* 15*s.*, and received the bankers' receipt for the same. She afterwards presented the receipt to the company, and made several fruitless applications to the committee for scrip, and at length was informed that the directors had come to the resolution not to issue any scrip, and that the greater part of the deposits had been expended, and the balance would be rateably divided. It appeared that the directors, finding it impossible to go to Parliament in the ensuing session, had determined not to issue any scrip; and

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that, of the entire number of 80,000 shares, 70,000 were allotted, but deposits were paid on 4000 only, producing altogether the sum of £10,500.

In an action by the plaintiff to recover back, from a member of the managing committee, the sum of 78*l.* 15*s.* so paid by her as deposits on the shares allotted to her :

*Held*, first, that there was sufficient evidence of the final abandonment of the project.

Secondly, that, on its abandonment, under the circumstances above stated, the plaintiff was entitled to recover back, as money had and received to her use, the whole sum so paid by her.

An association of this nature does not amount to a partnership. *Walstab v. Spottiswoode*, 501

### (3). *Liability of Provisional Committee-man to Secretary.*

A. and B. were the registered promoters, under the stat. 7 & 8 Vict. c. 110, of a railway company. A provisional committee was afterwards formed, at a meeting of which A. was appointed secretary, and B. solicitor, to the Company, and other persons a managing committee :—*Held*, that A. could not, merely upon these facts, recover against an acting member of the managing committee for services afterwards performed by him as secretary. *Wilson v. Viscount Curzon*, 532

### (4). *Construction of 7 & 8 Vict. c. 110, s. 2—Measure of Damages in Action for Non-delivery of Shares.*

The Leeds and Bradford Railway Company was incorporated by act of Parliament before the 1st of November, 1844. After that day, the company resolved to undertake the formation of an extensive line of railway from the Leeds and Bradford Railway at Shipley, to Colne. A parliamentary

## RAILWAY SHARES.

contract was duly entered into accordingly, which recited, "that it had been deemed expedient that a railway should be made by the Leeds and Bradford Railway Company from Shipley to Colne, in extension of and uniting with the parliamentary line of the Leeds and Bradford Railway." An act of Parliament was accordingly obtained, intituled, "An Act of Parliament to enable the Leeds and Bradford Railway Company to make a Branch from Shipley to Colne." The shares in this line were allotted and offered to the shareholders in the Leeds and Bradford line ; but there were, at the time of the passing of the act, shareholders in the extension line who were not shareholders in the Leeds and Bradford line :—*Held*, that the shareholders in the Shipley and Colne Railway did not constitute a company, the formation of which was commenced after the 1st day of November, 1844, within the meaning of the stat. 7 & 8 Vict. c. 110, s. 2.

In an action for the non-delivery of shares on a given day, pursuant to contract, the proper measure of damages is the difference between the contract price and the market price on the day when the contract was broken. *Shaw v. Holland*, 136

## RAILWAY SHARES.

### (1). *Order for Purchase of, how executed.*

1. The defendant gave the plaintiff, a broker on the Stock Exchange, an order to purchase for him fifty shares in a foreign railway company. At that time no shares of the company were in the market, the foreign government not having yet authorised its establishment ; but *letters of allotment* for shares were then, according to the evidence of persons on the Stock Exchange, commonly bought and sold in the market as shares. The plaintiff

bought for the defendant a letter of allotment for fifty shares:—*Held*, that a jury might well find that this was a good execution of the order. *Mitchell v. Newall*, 308

2. The defendant, a share broker, bought for the plaintiff scrip certificates, which were sold in the share market, at a premium, as “Kentish Coast Railway scrip,” and were signed by the secretary of the railway company. The genuineness of this scrip was afterwards denied by the directors, who alleged that it was issued by the secretary without authority. In an action to recover back from the defendant the price paid to him by the plaintiff for this scrip, and for his commission, on the ground of its not being genuine:—*Held*, that the proper question for the jury was, whether what the defendant intended to buy was that which was sold in the market as Kentish Coast Railway scrip. *Lamert v. Heath*, 486

(2). *Contract for Purchase of, by Broker.*

A shareholder employed to purchase shares or scrip of a railway company, does not thereby undertake to procure them absolutely and at all events, but only to use due and reasonable diligence to endeavour to do so.

A. employed B., a sharebroker at Manchester, and lodged money in his hands, to procure for him fifty shares in a certain railway company. B., without disclosing the name of his principal, entered into a contract with H., another sharebroker, to purchase them for him. According to the usage of the Stock Exchange at Manchester, there are two “settling days” in each month, on which all transactions between brokers and between them and their principals, are to be settled, although in some instances settlement is not enforced by brokers on the pre-

scribed days. H. did not perform his contract with B. by the next settling day; and B. having, after that day, refused to return A. his money:—*Held*, that A. was entitled to recover it back from B. in an action for money had and received. *Fletcher v. Marshall*, 755

REMITTER.

An estate being limited by marriage settlement to the use of A. and his wife, and the heirs of their bodies, and A. having died, leaving his widow and three children, viz. G. an only son, and L. and H. daughters, the widow, in 1735, by deed poll, in consideration of an annuity granted to her by her son G., and of natural affection, granted, surrendered, and yielded up the estate to G. in fee; and he afterwards, during her life, suffered a recovery. The widow died in 1767; G. died without issue in 1779, having devised the estate to trustees to secure the payment of an annuity to W., the only son of his sister L. (who was then dead), and subject thereto, to B., the eldest son of W., for life, with remainder to his second son. In 1790, B. entered, on his father's death, into possession of the entirety of the estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life. In 1814, he suffered a recovery of one moiety, and in 1816 conveyed the entirety of the estate to mortgagees in fee. In 1818, M., the descendant of the other coparcener, H., at B.'s request, suffered a recovery of a moiety, which it was declared should enure (subject to a term to secure a sum of money to M.) to the use of B.'s mortgagees:—

*Held*, on error, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer): 1. That the deed poll of 1735 operated as a covenant to stand



seised, and created a base fee, determinable by the entry of the issue in tail. 2. That this base fee did not, on the death of the widow, become merged in the reversion in fee in G., as the estate tail subsisted as an intermediate estate; and that although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued till his death, and therefore the period of twenty years, for the operation of the Statute of Limitations against the issue in tail, was to be calculated from G.'s death in 1779, and not from the death of his mother in 1767, and so that B.'s entry in 1790 was not barred by lapse of time. 3. That although B. entered under the will, and manifested an intention to take the estate under it, for his life only, that intention was immaterial, and he was remitted, nolens volens, as to his moiety, to the original estate tail, which was barred by the recovery in 1814.

*Held* also (reversing the judgment of the Court of Exchequer), that the entry and remitter of B. did not operate to remit M., his coparcener, to the other moiety of the estate. *Woodroffe v. Doe d. Daniell*, 769

### RESTRAINT OF TRADE.

The plaintiffs agreed in writing with L., that he should serve them for seven years as a crown-glass maker; that he should not during that term work for any other person without their license; that they might deduct from his wages any fine he might incur for breach of their rules; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick or lame, the plaintiffs should be at liberty to employ any other person in his stead, without paying him any wages; that the plaintiffs should pay him, so long as he should be employed and work as a crown-glass

maker, certain wages by the piece, and £8 a year, in lieu of house-rent and firing; and that the plaintiffs should have the option of dismissing him from their service on giving him a month's notice or a month's wages:—*Held*, that this agreement bound the plaintiffs to employ L. during the seven years, subject to the above power of dismissal; that there was, therefore, a good consideration for L.'s contract to serve for the seven years, and the agreement was not in unlawful restraint of trade. *Pilkington v. Scott*, 657

### SERMON.

See LIBEL, (1).

### SHERIFF.

#### *Liability of, after Attachment.*

The plaintiff recovered judgment against the defendant for £61, and a ca. sa. issued, indorsed to levy that sum, together with costs, &c. The sheriff having disobeyed a rule of Court to bring in the body, an attachment issued against him, which was set aside on payment of costs, and on perfecting special bail. These terms not being complied with, owing to a mistake of the sheriff's officer, a habeas corpus issued to the coroner to bring up the body of the sheriff. The sheriff thereupon took out a summons to shew cause why, upon his complying with the previous rule, and paying the costs of the habeas, all further proceedings under it should not be stayed. Before this summons became returnable, the under sheriff paid over to the plaintiff's attorney the full amount of the penalty of the bail-bond, and the costs. The Court made absolute a rule upon the plaintiff to refund to the sheriff the surplus beyond the £61 and costs. *Regina v. The Sheriff of Middlesex*, 146

## SHIPPING.

(1). *Amount of Liability of a Shipowner for Collision.*

The liability of a shipowner, for the damage done by the collision of his ship with another vessel, is limited, by the stat. 53 Geo. 3, c. 159, to the value of his ship "at the time of," that is, *immediately before*, the collision. He is not, therefore, exempted from liability, where by the same collision his own ship instantly founders. *Brown v. Wilkinson*, 391

(2). *Bill of Lading—Exception of Dangers and Accidents of Navigation—Liability of Shipowner for Negligence.*

A vessel laden with goods arrived in the port of London, and was taken into the Commercial Dock to discharge her cargo. For this purpose she was fastened by tackle, on the one side to a loaded lighter lying outside her, and on the other to a barge lying between her and the wharf. The crew were discharged, except the mate, and lumpers were being employed in unloading her, when the tackle broke whereby she was fastened to the lighter, and in consequence she canted over, water got in through her ports, and the goods still on board were damaged:—*Held*, that this was a loss within the exception in the bill of lading, of "all and every the dangers and accidents of the seas and navigation."

*Held*, also (in an action by the freighters against the shipowners to recover damages for this loss), that the jury were properly directed, "that the owners were only bound to take the same care of the goods as a person would of his own goods, that is, an ordinary and reasonable care." *Laurie v. Douglas*, 746

## SMALL DEBTS ACT.

*Construction of 8 & 9 Vict. c. 127—Commitment.*

Under the 8 & 9 Vict. c. 127, s. 1, a party may be imprisoned for non-payment of a debt not exceeding £20, due upon a judgment, although the judgment debt originally exceeded £20.

A warrant of commitment under that act, by the judge of the Palace Court, ordered that a defendant should be committed for the term of twenty days to the common gaol wherein debtors under judgment and in execution of the superior courts of justice may be confined in the county of Surrey; and was directed to H. H., an officer of the said court, and to the keeper of the debtors' prison above mentioned, for the county of Surrey; and the defendant was imprisoned under it in Horsemonger-lane Gaol, being the only debtors' prison for the county of Surrey:—

*Held*, first, that the warrant was properly directed to and executed by H. H., notwithstanding s. 18 of the act, saving the right of the high bailiff of Westminster to the execution of process; secondly, that the twenty days' imprisonment began to run from the time of the defendant's being actually lodged in prison under the warrant; and thirdly, that the place of imprisonment was sufficiently designated in the warrant. *Ex parte Foulkes*, 612

## SPECIAL CASE.

*See* ARBITRATION, (3).

## SPECIAL JURY.

*See* ARBITRATION, (2).  
COSTS, (1).



## STAMP.

(1). *Award.*

A number of coach-proprietors, who horsed a coach, were in the habit of having monthly accounts made out, containing the names of proprietors, the amount of the receipts and disbursements, the number of miles worked by each, and the proportion of the earnings to which each was entitled. These accounts were made out by the clerk of one of the proprietors, partly from materials furnished by them, and partly from the way-bills; and the practice was, for the clerk to send to each proprietor a copy of the monthly account, shewing the amount which each had to receive or pay, and the proprietor or proprietors from or to whom he was to receive or pay such amount:—*Held*, that this account was not an award, and was admissible in evidence without a stamp. *Goodyear v. Simpson*,

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(2). *Agreement—Authority to distrain.*

The following document was given in evidence by a defendant in replevin, in support of his right to distrain as bailiff of J. W.:—"I, J. W., of &c., having, on the 7th of October, 1843, borrowed from J. P. [the defendant] £300, did then pledge with him certain title-deeds of houses in T., in order to secure to him £300 with interest. I did then authorize J. P. to receive the rents of the said houses during my right and interest therein; and I hereby confirm and make valid all acts, distresses, &c., particularly a distress on W. P., [the plaintiff], tenant of one of the said houses, by the said J. P., and other proceedings made or taken, or to be made or taken, by the said J. P., to the end that the rents and profits of the said houses may be received and taken by the said J. P. during all my estate and interest. (Signed) J. W."

*Held*, that this document did not require a stamp, either as an agreement accompanied with a deposit of title-deeds for making a mortgage, or as an authority to distrain, or as an agreement. *Pyle v. Partridge*, 20

(3). *Promissory note.*

The plaintiff deposited with the defendant the sum of £500 for the purpose of a speculation in foreign stock, and the defendant signed the following memorandum:—"Bristol, August 14, 1843. Memorandum.—Mr. S. has this day deposited with me £500, on the sale of £10,300, £3 per Cent. Spanish, to be returned on demand:—*Held*, that this was not a promissory note, and did not require a stamp as such. *Sibree v. Tripp*, 23

(4). *Bond.*

A bond conditioned for the payment to bankers of all such sums of money, not exceeding in the whole £1000, which from time to time should be and remain due from the obligor to the bankers on the balance of his account current, *together with such interest and commission* as should be due to the said bankers, and all *customary and incidental charges* for stamps, &c., requires a stamp only on the principal sum of £1000. *Frith v. Rotherham*, 39

## STATUTE.

*See* CONVICTION, (1).

FISHERY.

JOINT STOCK REGISTRATION ACT.

LONDON COAL ACT.

RAILWAY ACT.

SURVEYOR OF HIGHWAY.

*Local and Personal Act, what is—  
Building Act—General Issue by  
Statute—Venue.*

The Building Act, 14 Geo. 3, c. 78, was an act "of a local and personal

## TITHES.

nature," and therefore the power given by the 100th section of that act, of pleading the general issue and giving the special matter in evidence, was taken away by the stat. 5 & 6 Vict. c. 97, s. 3.

The defence, that the venue in an action against a person for an act done in pursuance of the Building Act, 14 Geo. 3, c. 78, was not laid in Middlesex, pursuant to the 100th section of that act, is one which must be specially pleaded, and cannot be taken advantage of under not guilty. *Richards v. Easto*, 244

## SURVEYOR OF HIGHWAY.

*Protection of, under 5 & 6 Will. 4, c. 50, s. 109.*

The defendant, having been appointed a surveyor of the highways by the inhabitants in vestry, but informally, cut down, in the supposed exercise of his duty as surveyor, a tree which was overhanging the highway so as to be a nuisance to it:—*Held*, that he was entitled to the protection of the stat. 5 & 6 Will. 4, c. 50, s. 109. *Huggins v. Waydey*, 357

## TITHES.

*See* LIMITATION ACT.

*Modus decimandi, what is.*

A prescription for the lord of a manor to hold and enjoy the manor freed and discharged from tithe, on payment to the rector of the annual

## WITNESS.

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sum of £40, in lieu and compensation of all tithes within the manor; and for the lord, in consideration of this payment of £40, to have for himself, his heirs, or assigns, from the occupiers of lands within the manor, a tenth of all titheable matters within the manor,—is not a "modus decimandi, or exemption or discharge from tithes," within the meaning of the stat. 2 & 3 Will. 4, c. 100.

Quære, whether such prescription is good in law. *Knight v. The Marquis of Waterford*, 419

## VENUE.

*See* STATUTE.

## WHARFINGER.

*See* ACTION ON THE CASE.

## WITNESS.

*Examination of Witnesses abroad on Information by Attorney-General.*

In an information by the Attorney-General for penalties for a breach of the revenue laws, this Court has no jurisdiction, on motion by the defendant, either at common law or by statute, to direct a commission to issue for the examination of witnesses abroad; nor will it stay the proceedings until the Attorney-General consents to the issuing of such commission. *The Attorney-General v. Bovet*, 60

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